89-945

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

WEDGE GROUP INCORPORATED
Petitioner,

v.

THIRD NATIONAL BANK IN NASHVILLE,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a subrogation claim "arise out of" contacts that did not establish the underlying obligation for purposes of determining whether the due process clause authorizes the exercise of personal jurisdiction over a nonresident corporation?

2. Does a nonresident corporation's ownership of a resident subsidiary and exercise of its power to participate in the management of the subsidiary qualify as a "contact" adequate to confer personal jurisdiction over the nonresident?

II

PARTIES

The caption contains the names of all parties. WEDGE International Holdings, B.V., owns WEDGE Group Incorporated ("WEDGE"), petitioner. WEDGE owns a majority of the stock of Process Systems International, Inc., and a minority interest in The Rodgers Companies, Inc. WEDGE has no other direct subsidiaries or affiliates except for subsidiaries it wholly owns.

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OFFICIAL AND UNOFFICIAL REPORTS

The official reporter has not yet published the decision of the court of appeals. The Appendix contains that court's slip opinion, App. A, the district court's orders, App. D & E, and the magistrate's recommendation, App. C.

JURISDICTIONAL GROUNDS

The court of appeals issued and entered its judgment on August 16, 1989. App. A. That court also denied WEDGE's motion for rehearing on September 22, 1989. App. F. On October 31, 1989, the court of appeals stayed issuance of its mandate without specifying a time limit. App. G. WEDGE invokes this Court's jurisdiction pursuant to 28 U.S.C. § 2101(c) (1982).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

> (a) Persons who are non-residents of Tennessee . . . are subject to the jurisdiction of the courts of this state as to any action or claims for relief arising from:
>
> * * *
>
> (6) Any basis not inconsistent with the Constitution of this state or of the United States.
>
> * * *
>
> (b) "Person" as used herein shall include corporations and all other entities which would be subject to service of process if present in this state.
>
> (c) Any such person shall be deemed to have submitted to the jurisdiction of this state who acts in the manner above described through an agent or personal representative.

Tenn. Code Ann. § 20-2-414 (1980).

> Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

Fed. R. Civ. P. 4(e).

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PETITION FOR WRIT OF CERTIORARI

WEDGE Group Incorporated ("WEDGE"), petitioner, petitions as follows for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit:

STATEMENT OF THE CASE

In the second half of 1986, The Rodgers Companies, Inc. ("TRC") and various of its subsidiaries ("TRC group") apparently defaulted on a loan from Third Na-

tional Bank in Nashville, respondent.[1] App. H. ¶ 5; J ¶ 6; K ¶5 & L ¶ 4. Third National accelerated the debt. App. H ¶ 5; J ¶ 6; K ¶ 5 & L ¶ 4. On November 17, 1987, the bank filed this diversity[2] action against WEDGE to recover part of its loan. App. H. Third National grounded its claim on a security agreement between it and its debtors, alleging that the agreement gave it a subrogation right and entitled it to pursue collection of an account receivable it asserted WEDGE owed the debtors.

The account receivable claim related to a Tax Sharing Agreement that WEDGE, TRC, and five TRC subsidiaries had entered into effective October 1, 1980. App. H Ex. "D." The Tax Sharing Agreement obligated TRC to pay WEDGE an amount equal to the federal income tax liability TRC and the five subsidiaries would incur if they computed and reported earnings as a consolidated group. TRC agreed to make interim payments on that hypothetical basis during each tax year. At the time for filing a return, if TRC had paid more than the group's hypothetical tax liability for that tax year, WEDGE would refund the excess. Otherwise, TRC would pay WEDGE any deficiency. The parties agreed to the filing of returns for WEDGE, TRC, and the five subsidiaries as a consolidated group. They also agreed that Texas law would govern the agreement and negotiated and signed it in Texas.

Third National's claim against TRC arose out of the last two in a series of loan agreements. According to

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1. WEDGE does not necessarily agree with the factual assertions in Third National's affidavits and simply recites the assertions before the district court.

2. *See* 28 U.S.C. § 1332 (1982).

recitals in the Fourth Amendment to Loan Agreement, Third National entered into the original Loan Agreement as of May 7, 1982 and amended it as of January 20, 1983, July 11, 1983, and June 5, 1985. *Id.* Ex. "A." The Fourth Amendment took effect as of February 21, 1986 and the Fifth Amendment to Loan Agreement as of January 16, 1987. *Id.* Exs. "A" & "B." Third National alleged in this action that TRC owes it $6,150,082.36 plus interest and expenses and that its security interest in TRC's accounts receivable entitled it "to enforce TRC's rights under the Tax Sharing Agreement with WEDGE." *Id.* ¶ 5. It also alleged that "WEDGE owes $2,568,983 to TRC, and hence to Third National, under the Tax Sharing Agreement" and that Texas law authorized recovery of attorney fees from WEDGE. *Id.* ¶ 6.

WEDGE had little connection with Tennessee. A Delaware corporation, WEDGE maintained its principal place of business outside the state. *Id.* ¶ 1. It had never held title to property in Tennessee. App. I. It had not directly kept offices there. *Id.* It had no mailing address or phone listing within the state. *Id.* It had not directly retained Tennessee employees. *Id.*

Any contacts WEDGE did have stemmed from its ownership of TRC. WEDGE had owned most of TRC for about eight years, from 1978 until 1986, *id.*, and three WEDGE officers at various times had served as directors of either TRC or Rodgers Construction, Inc. ("RCI"), a TRC subsidiary, App. J ¶ 7. From 1980 to 1984, WEDGE officers met monthly in Nashville to discuss TRC and its subsidiaries with TRC and RCI management. *Id.* ¶ 8. The frequency of the meetings fell to three or four times a year in late 1984 or early 1985.

Id. ¶ 9. WEDGE and TRC asked Third National to continue extending credit to the TRC group in April and May 1985. App. L ¶ 5. Two officers of WEDGE negotiated with the bank in Nashville for an amendment to the original Loan Agreement. *Id.* WEDGE agreed to pay $7.5 million for additional TRC stock and deposited that amount in a Third National checking account for use in the TRC group's ordinary course of business. *Id.* ¶ 6. Only certain WEDGE officers, including a TRC director, could order disbursements from the account. *Id.* Third National entered into a Third Amendment to Loan Agreement with the TRC group as of June 5, 1985. *Id.* ¶ 5.

WEDGE's dealings with TRC lasted through mid-1986. Around the end of 1985, two WEDGE officers reviewed the accounts of TRC and RCI and set up a cash reporting system for them. *Id.* ¶ 13; App. K ¶ 6. A year later, when the TRC group experienced serious financial problems, TRC management started negotiating a purchase of WEDGE's TRC stock through a new corporation. App. J ¶ 14; K ¶ 7; L ¶ 9. WEDGE representatives traveled to Nashville and reviewed TRC's financial position to determine whether and at what price WEDGE should sell the stock. App. J ¶ 14; K ¶ 8. In February 1986, WEDGE and representatives of the prospective purchaser signed a letter agreement. App. J ¶ 15; K ¶ 9; L ¶ 10. Someone telecopied the letter agreement to Nashville, and Third National relied on it in agreeing to restructure the TRC group's debt. App. J ¶ 16; L ¶ 10. In March, during negotiation of a final stock purchase agreement, WEDGE suggested that the stock purchase agreement eliminate any obligations WEDGE might have to TRC under the Tax Sharing Agreement. App. J ¶ 18; L ¶ 11. In late May or early June, a WEDGE officer met in Nashville

with the prospective buyer's representatives and lawyers to talk about the stock purchase agreement. App. K ¶ 10. On June 4, the parties closed on the stock purchase agreement. App. J ¶ 21; K ¶ 10.

WEDGE had already executed the closing documents, and its Houston counsel delivered them to Nashville. App. J ¶ 20. The closing documents included an Agreement Relative to Accounts Receivable among WEDGE, TRC, and Third National. *Id.* The agreement recited that WEDGE denied any liability to TRC under the Tax Sharing Agreement. App. L Ex. "A." It also provided that Third National would forbear from seeking to collect on any such liability until one of five events occurred. *Id.*

WEDGE and TRC had observed all corporate formalities in conducting their respective businesses. App. I. No WEDGE officer or director had served as an officer of TRC. *Id.* TRC officers alone made day-to-day business decisions. *Id.* TRC had remained responsible for its relations with its customers, suppliers, legal counsel, banks, and public accountants. *Id.* WEDGE and TRC had kept separate bank accounts, used separate accounting and payroll systems, prepared separate budgets, and maintained separate financial records. *Id.* At all times, WEDGE and TRC constituted distinct corporate entities. *Id.*

WEDGE timely filed its motion to dismiss for lack of personal jurisdiction, and the district court referred the motion to a magistrate. On May 3, 1988, the magistrate submitted a report in which he recommended denial of the motion. App. C. The district court rejected the report and granted WEDGE's motion by order of June 1. App. D. Third National sought reconsideration, but the district court denied the motion on August 4. App. E. On August

22, the Sixth Circuit Court of Appeals dismissed an appeal that Third National had filed in the interim. 856 F.2d 196 (6th Cir. 1988). Third National renewed its appeal on September 1.

The Sixth Circuit reversed. The court considered "it apparent that WEDGE's contacts with Tennessee are not of a 'continuous and systematic' nature such that Tennessee could maintain personal jurisdiction over WEDGE in an action unrelated to its Tennessee conduct." App. A at ____. The court nonetheless concluded that "specific jurisdiction exists over WEDGE in Tennesee." *Id.* (following *Southern Machine Co., Inc. v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968)). In doing so, the court relied on the Tennessee long-arm statute, under which "Tennessee courts exercise personal jurisdiction 'to the full limit allowed by due process' " *Id.* at ____ (quoting *Masada Inv. Corp. v. Allen*, 697 S.W.2d 332, 334 (Tenn. 1985)). The only question the court decided "is whether the exercise of personal jurisdiction over WEDGE in Tennessee would violate due process." *Id.* at ____.

REASONS FOR ALLOWING THE WRIT

The Sixth Circuit erred in failing to hold that the due process clause prohibited the Tennessee district court from exercising personal jurisdiction over WEDGE. Third National's subrogation claim lacked the necessary connection to WEDGE's Tennessee contacts, and WEDGE's ownership and management of TRC did not constitute sufficient contacts with the state.

THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH *KULKO v. CALIFORNIA SUPERIOR COURT*, 436 U.S. 84 (1978) AS WELL AS *HANSON v. DENCKLA*, 357 U.S. 235 (1958) AND PRESENTS AN IMPORTANT QUESTION THE COURT SHOULD RESOLVE DUE TO ITS SUBSTANTIAL IMPACT ON INTERSTATE AND INTERNATIONAL TRADE.

This case raises the question of what kind of connection must exist between a defendant's in-state activities and the plaintiff's claim before a court may constitutionally exercise personal jurisdiction over the defendant. The court below held that a "substantial connection" will do even if the claim does not "arise out of" the defendant's contacts with the state and that a claim arising out of a contract will suffice even if the contract has no substantial connection to the forum state. The Sixth Circuit's analysis runs counter to at least two of this Court's precedents. It also threatens to chill commerce with every company that pledges its accounts receivable to a lender.

The Sixth Circuit liberalized rather than applied the *International Shoe*[3] minimum contacts test as the Court elaborated it in *Kulko* and *Denckla*. The Court there determined that a contract does not establish minimum contacts unless it both has a substantial connection to the state of the forum and forms the basis for the plaintiff's claim (the claim "arises out of" the contract). The contract in *Denckla* failed the test because the trustee and settlor had executed the trust agreement outside the forum state, Florida, and because the claims arose from the agreement instead of its "republication" in Florida. *Denckla*, 357 U.S. at 252-53. Minimum contacts did

3. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

not exist in *Kulko* because the claim arose out of a contract, a separation agreement that the couple had negotiated and signed in New York, that had "virtually no connection with the forum State [of California]." *Kulko*, 436 U.S. at 97. In this case, the court below decided that Third National's subrogation claim "arose out of" the WEDGE-TRC Tax Sharing Agreement, which created no obligation to Third National and had almost no connection to Tennessee. In other words, a claim arises out of a contract (1) so long as another contract gives a third-party a right to enforce the first contract and (2) even if the first contract lacks any substantial connection to the forum state. The decision conflicts with at least *Denckla* and *Kulko*, and the Court should allow the writ to correct the Sixth Circuit's deviation from precedent.

The error resulted from application of a vague and overly broad standard. Relying on dicta in two footnotes of its 1968 *Southern Machine* decision, the court below determined that any "cause of action" need only *"have a substantial connection with* the defendant's in-state activities." App. A at ____ (quoting *Southern Machine*, 401 F.2d at 384 n.27) (emphasis added in original). That test combines two distinct parts of the minimum contacts analysis—the requirements of a purposeful contact and of a claim arising out of that contact. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (stating requirements for specific jurisdiction). The Sixth Circuit's legal error led it to conclude that

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4. *See also Asahi Metal Indus. Co. Ltd. v. California Superior Court*, 107 S. Ct. 1026 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

virtually any in-state conduct that has some relation to the claim establishes minimum contacts.

That the court below ignored the trend away from expansion of personal jurisdiction underscores the need for review. The minimum contacts test reached its outer limit in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), where the Court held that due process allowed a California court to exercise personal jurisdiction over a Texas insurance company where the plaintiff sued on a policy that had a "substantial connection" with California. *Denckla, Kulko,* and later cases have halted and reversed the growth. *See, e.g., Burger King,* 471 U.S. at 478 (stating that contract alone "clearly . . . cannot" establish minimum contacts).[4] Rather than acknowledging the trend, the Sixth Circuit followed its own 1968 decision in concluding that contracts provide minimum contacts if they either have a substantial connection with the forum state or constitute the basis of the lawsuit. App. A at ____ (citing *Southern Machine Co., Inc. v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968)). The regressive nature of the court's deviation increases the importance of review.

The Court has so far declined to specify the kind of connection *International Shoe* requires between the defendant's contacts and the plaintiff's claim. *McGee* held only that a "suit based on a contract which had a substantial connection with" the forum state satisfied due process. 355 U.S. at 223. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984), the Court did not reach the question of "what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination" that the

cause of action "arises out of" or "relates to" those contacts. This case presents an opportunity to clarify that *Kulko* and *Denckla* define the necessary connection.

Allowing the Sixth Circuit's opinion to stand could wreak havoc on interstate and international trade. Under that court's theory, a court may constitutionally command the appearance of any nonresident that happens to owe money to a resident whenever the latter has given a creditor a security interest in that account receivable and defaulted on the loan. Such a theory could subject purely local companies to the jurisdiction of states a continent away simply because they chose to deal with a national seller. Less dramatically, it could also force nonresident owners of a resident business to answer lawsuits in distant forums for no other reason than that they bought something from the business. Nothing in the Court's precedents would sanction such perverse results. *See, e.g., Denckla,* 375 U.S. at 253. ("The unilateral activity of those who claim some relation with a nonresident defendant cannot satisfy the requirement of contact with the forum State."). But, by holding that Third National's subrogation claim "arose out of" WEDGE's contacts with Tennessee, the Sixth Circuit has invited them.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS AND PRESENTS AN IMPORTANT FEDERAL LAW QUESTION THAT THE COURT SHOULD SETTLE.

A split in the Circuits has developed and persisted over the effect of *International Shoe* on the Court's decision in *Cannon Mfg. Co. v. Cudahy Packing Co.,* 267 U.S. 333 (1925). The *Cannon* Court held that a nonresident could own and direct the business of a resident

corporation without subjecting itself to the personal jurisdiction of local courts. The Sixth Circuit in this case determined that WEDGE's similar conduct qualified as purposeful "contacts" with Tennessee. App. A at ____ & n.1 (quoting *Velandra v. Regie Nationale des Usines Renault*, 336 F.2d 292, 297 (6th Cir. 1964)). Some federal courts of appeals share the Sixth Circuit's view, but others reject it. The conflict leaves business owners unsure of the extent to which participating in the management of their businesses may force them to defend against lawsuits in faraway courts and presents a significant issue that the Court ought to resolve.

The first group of cases, which the decision below represents, hold that a nonresident establishes a contact with the forum state by owning and directing the activities of a resident company. In this case, the Sixth Circuit treated as "contacts" with Tennessee WEDGE's ownership of TRC, the role of WEDGE officers as directors of TRC, meetings in Tennessee between WEDGE officers and TRC management to "review and direct" the subsidiary's operations, the 1980 Tax Sharing Agreement, the participation of WEDGE officers in negotiation of the Third Amendment to Loan Agreement between the TRC group and Third National, WEDGE's purchase of additional TRC stock and deposit of the purchase money in a Third National account, and the Agreement Relative to Accounts Receivable among WEDGE, TRC, and Third National. App. A at ____. Each of those "contacts" arose from WEDGE's ownership of TRC. The Sixth Circuit nonetheless considered each a basis for concluding that WEDGE had minimum contacts with Tennessee.

Two other Circuits arguably agree with the court below. In *Wells Fargo & Co. v. Wells Fargo Express Co.*,

556 F.2d 406, 415 (9th Cir. 1977), the court determined that a foreign parent's in-state negotiation and consummation of a loan to a resident subsidiary might satisfy the minimum contacts test if the claim arose from that conduct. The First Circuit likewise concluded that the existence of common directors, the foreign parent's sales to the local subsidiary, and its financial and managerial supervision of the subsidiary supported a finding of minimum contacts. *See Engine Specialties, Inc. v. Bombardier Ltd.*, 454 F.2d 527, 530 (1st Cir. 1972). That court also regarded as "relevant factors" the "interlocking ties of corporate control, such as common directors and officers. . . ." *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 440 (1st Cir.), *cert. denied*, 385 U.S. 919 (1966); *see Mangual v. General Battery Corp.*, 710 F.2d 15, 21 (1st Cir. 1983) (citing *Rohlsen* for proposition that "close relationship between [parent and subsidiary] is a relevant factor"). In each case, the "contacts" on which the court relied involved nothing more than ownership and its normal incidents.

Other courts of appeals require considerably more before they will deem dealings between parent and subsidiary a "contact" of the parent with the state of the forum. The Fifth Circuit recently reiterated its "well-settled" rule that "where . . . a wholly owned subsidiary is operated as a distinct corporation, its contacts with the forum cannot be imputed to the parent." *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 773-74 (5th Cir. 1988) (footnote omitted).[5] In *Harris v. Deere &*

5. For earlier Fifth Circuit cases stating the rule, see *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 372-73 (5th Cir. 1987); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 492-93 (5th Cir. 1974).

Co., 223 F.2d 161, 162 (4th Cir. 1955) (per curiam), the court held that *Cannon* "precluded" it from considering the in-state "activities" of a subsidiary in assessing the parent's minimum contacts. In *Blount v. Peerless Chems. (P.R.) Inc.*, 316 F.2d 695, 698-700 (2d Cir.), *cert. denied*, 375 U.S. 831 (1963), the court refused to attribute a parent's contacts to a nonresident subsidiary despite the facts that the same person served as president and a director of both, that he resided in the forum state, and that the subsidiary bought products from and through the parent. Rather than treating ownership and the normal relations resulting from it as "contacts," those courts have considered them irrelevant to the minimum contacts analysis.

A distinction between general and specific jurisdiction does not resolve the conflict. Under both aspects of the minimum contacts test, ownership does or does not qualify as a jurisdictional contact. *Compare Burger King*, 471 U.S. at 472-73 (discussing contacts necessary to establish specific jurisdiction), *with Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-17 (1984) (same for general jurisdiction). Specific jurisdiction analysis simply adds a requirement that the defendant "purposefully" make or cause the contact. *See, e.g., Burger King*, 471 U.S. at 472 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). An act that courts do not consider a "contact" under the less demanding general jurisdiction standard cannot at the same time constitute a "purposeful contact" under the test for specific jurisdiction.

The Sixth Circuit erred in treating WEDGE's ownership of TRC and involvement in its management as contacts with Tennessee. The First and Ninth Circuits

share that error. The decisions by other courts of appeals supply the correct rule: Dealings solely between a parent and subsidiary corporation amount to contacts only if the entities constitute alter egos of one another or one acts as agent for the other. *See, e.g., Southmark Corp.*, 851 F.2d at 773-74 & 774 n.18 (alter ego); *Minnesota Mining & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1265 (Fed. Cir. 1985) (alter ego); *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120-22 (2d Cir. 1984) (alter ego); *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 750 F.2d 1516, 1521-23 (11th Cir. 1985) (agency); *I.A.M. Nat'l Pension Fund v. Wakefield Indus., Inc.*, 699 F.2d 1254, 1258-59 (D.C. Cir. 1983) (agency and alter ego); *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc.*, 519 F.2d 634, 637-38 (8th Cir. 1975) (alter ego); *Curtis Publishing Co. v. Cassel*, 302 F.2d 132, 137-38 (10th Cir. 1962) (agency).

The Court has not addressed the question since deciding *International Shoe* but has adverted to it. In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 108 S. Ct. 2104, 2111 n.** (1988), the Court noted its holdings in *Cannon* and *Consolidated Textile Co. v. Gregory*, 289 U.S. 85, 88 (1933), that "the activities of a subsidiary are not necessarily enough to render a parent subject to a court's jurisdiction, for service of process or otherwise." The Court stated in *Keeton* that "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary." 465 U.S. at 781 n.13 (citing *Consolidated Textile*, 289 U.S. at 88, and *Peterson v. Chicago, R.I. & P.R. Co.*, 205 U.S. 364, 391 (1907)). *Compare National Carbide Corp. v. Commissioner*, 336 U.S. 422, 438 n.21 (1949) (citing *Cannon* and *Peterson* for proposition that parent "as owner of the subsidiary

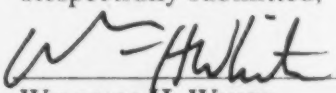
was not" subject to service of process through subsidiary). The issue remains one for the Court to decide.

The importance of the issue to consistency among the Circuits and commerce warrants the Court's intervention to resolve the conflict. Subsidiaries account for a substantial part of interstate and international trade. Subjecting nonresident shareholders to personal jurisdiction wherever jurisdiction exists over their companies can only deter investment and hinder commerce. The Court has noted that the due process clause "allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). Permitting courts to deem stock ownership and the owner's normal dealings directly with the company as jurisdictional contacts would destroy the predictability that the due process clause assures.

CONCLUSION

WEDGE respectfully requests that the Court grant its petition and issue a writ of certiorari to review the decision of the Sixth Circuit.

Respectfully submitted,



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CERTIFICATE OF MAILING AND SERVICE

As a member of the bar of this Court, I certify that to my personal knowledge the appropriate number of copies of this Petition for Writ of Certiorari were deposited in a United States post office, with first-class postage prepaid, and properly addressed to the Clerk of this Court and counsel of record for Third National Bank in Nashville, respondent, on this 30th day of November, 1989 and within the time permitted for filing the Petition.

WILLIAM H. WHITE

SWORN TO AND SUBSCRIBED BEFORE ME, a Notary Public, on this 30th day of November, 1989, to certify which witness my hand and official seal.

Notary Public, in and for the
State of T E X A S

Louise A. Burke
(Print Name of Notary Here)

My Commission Expires: 2/3/90

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APPENDIX A

NO. 88-5825/6019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THIRD NATIONAL BANK IN NASHVILLE,
Plaintiff-Appellant,

v.

WEDGE GROUP INCORPORATED,
Defendant-Appellee

On Appeal from the United States District Court
for the Middle District of Tennessee

Decided and Filed August 16, 1989

Before: KEITH, KENNEDY and RYAN, Circuit Judges:

RYAN, Circuit Judge, delivered the opinion of the court, in which KENNEDY, Circuit Judge, joined. KEITH, Circuit Judge, (pp. 12-16) delivered a separate concurring opinion.

RYAN, Circuit Judge. This appeal presents a question of the reach of the Tennessee long-arm statute, which is coextensive with the limits of due process. The district court dismissed the diversity action of plaintiff Third National Bank in Nashville, holding that defendant

WEDGE Group Incorporated was not subject to personal jurisdiction in Tennessee. We disagree and reverse.

I.

From 1982 to 1986 Third National Bank in Nashville, a Tennessee bank, made loans totalling approximately $42 million to The Rogers Companies, Inc. ("TRC"), a construction firm incorporated in Delaware and with its principal place of business in Tennessee. TRC was a wholly-owned subsidiary of WEDGE Group Incorporated, a Delaware corporation with its principal place of business in Texas. In conjunction with its loans to TRC, Third National obtained a security interest in, among other assets, TRC's accounts receivable and rights to payment.

TRC, along with its various subsidiaries, had entered a "Tax Sharing Agreement" with WEDGE in 1980. This agreement was executed in Texas and, by its terms, is subject to Texas law. Under the agreement, WEDGE, TRC, and TRC's subsidiaries formed a consolidated group for income tax reporting purposes and filed consolidated federal income tax returns. The agreement required TRC to calculate a "hypothetical" tax liability, as if it and its subsidiaries were not members of the consolidated group, and if this hypothetical tax liability was more than TRC's share of actual taxes paid under the consolidated group tax return, TRC was liable to WEDGE for the difference; if the hypothetical liability was less than TRC's actual tax payments, WEDGE was liable to TRC for the difference. WEDGE was also obligated under the Tax Sharing Agreement to pay TRC an amount equal to the tax benefit to the consolidated group of any TRC net operating losses used to offset group income in the consolidated return.

After the Tax Sharing Agreement was executed in October 1980, WEDGE officers who served as TRC directors met regularly in Nashville with TRC personnel to review and direct the operations of TRC and its subsidiaries. These meetings occurred on a monthly basis through 1984 and less frequently in 1985 and 1986.

In April and May 1985, WEDGE officers and TRC personnel negotiated with Third National for a continued extension of credit from Third National to TRC and its subsidiaries. These negotiations resulted in a third amendment to the Third National-TRC loan agreement, dated June 1985. To induce Third National to enter this amended agreement, WEDGE agreed to make a capital contribution to TRC of $7.5 million, which WEDGE deposited in a checking account at Third National. Only WEDGE officers were authorized to direct disbursements from this Tennessee bank account.

In 1986, TRC's financial position deteriorated, and WEDGE officers negotiated with TRC management for the sale of WEDGE's ownership interest in TRC. During these negotiations, WEDGE sought to deny liability for amounts owed TRC under the Tax Sharing Agreement. The issue was temporarily resolved in June 1986, when representatives of WEDGE, Third National, and TRC met in Nashville and entered an "Agreement Relative to Accounts Receivable," also known as the "Tax Receivable Agreement." Under this agreement, Third National agreed temporarily to forbear seeking collection from WEDGE of amounts owed by WEDGE to TRC under the Tax Sharing Agreement. Upon execution of the Tax Receivable Agreement, WEDGE completed its sale of its ownership interest in TRC to TRC management.

Subsequently, TRC allegedly defaulted on its loan obligations to Third National, and in November 1987 Third National brought this diversity action against WEDGE in the United States District Court for the Middle District of Tennessee. Third National claims that TRC owes approximately $6.2 million under their loan agreement, and that "[b]y reason of [Third National's] security interest in [TRC's] Accounts, Third National is entitled to enforce TRC's rights under the Tax Sharing Agreement with WEDGE." Third National claims that under the Tax Sharing Agreement WEDGE owes TRC, and therefore Third National, approximately $2.6 million.

In December 1987, WEDGE filed a motion to dismiss under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. After the magistrate recommended denial of the motion, WEDGE timely filed objections, and in an order dated May 1988 the district court rejected the magistrate's recommendation and granted WEDGE's moto dismiss. The district court denied Third National's motion to reconsider, and this appeal followed.

II.

"The burden of establishing jurisdiction is on the plaintiff." *Welsh v. Gibbs,* 631 F.2d 436, 438 (6th Cir. 1980), *cert. denied,* 450 U.S. 981 (1981). The district court granted WEDGE's motion to dismiss without an evidentiary hearing, relying solely on the pleadings, affidavits, and other written submissions. In such a case, "the burden on the plaintiff is relatively slight and the district court 'must consider the pleadings and affidavits in the light most favorable to the plaintiff.' " *Welsh,* 631 F.2d at 439 (citation omitted.) "[T]he plaintiff should be required only to make a prima facie case of jurisdiction, that is,

he need only 'demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss.' " *Welsh,* 631 F.2d at 438 (citation omitted).

In a diversity case, a federal court determines whether personal jurisdiction exists over a nonresident defendant by applying the law of the state in which it sits. *American Greetings Corp. v. Cohn,* 839 F.2d 1164, 1167 (6th Cir. 1988). The Tennessee long-arm statute provides for personal jurisdiction over nonresidents on "[a]ny basis not inconsistent with the constitution of this state or the United States." Tenn. Code Ann. § 20-2-214 (1980). Under this statute, Tennessee courts exercise personal jurisdiction "to the full limit allowed by due process." *Masada Investment Corp. v. Allen,* 697 S.W.2d 332, 334 (Tenn. 1985). The sole question on this appeal, therefore, is whether the exercise of personal jurisdiction over WEDGE in Tennessee would violate due process.

The Supreme Court has held repeatedly that

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940)). The critical question minimum-contacts analysis seeks to answer is whether "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980).

In analyzing the due-process limits of personal jurisdiction, a distinction is made between "general" jurisdiction and "specific" jurisdiction. *See, e.g., Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 & 473 n.15 (1985). In a case of general jurisdiction, a defendant's contacts with the forum state are of such a "continuous and systematic" nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state. *See, e.g., Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437 (1952). In a specific jurisdiction case, "a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 n.8 (1984). We think it apparent that WEDGE's contacts with Tennessee are not of a "continuous and systematic" nature such that Tennessee could maintain personal jurisdiction over WEDGE in an action unrelated to its Tennessee contacts. Thus, personal jurisdiction in this case, if it exists, must be specific jurisdiction.

In *Southern Machine Co. v. Mohasco Industries, Inc.,* 401 F.2d 374 (6th Cir. 1968), a case of specific jurisdiction, this court set forth a three-part test for determining whether, consistent with due process, personal jurisdiction may be exercised:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

401 F.2d at 381. Analyzing the present case under the three *Southern Machine* criteria, we conclude that specific jurisdiction exists over WEDGE in Tennessee.

A.

The first *Southern Machine* criterion requires that the defendant must have "purposefully avail[ed] [it]self of the privilege of acting in the forum state or causing a consequence in the forum state." The "purposeful availment" requirement

> ensures that a defendant will not be haled into a jurisdiction as a result of "random," "fortuitous," or "attenuated" contacts, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. at 774, 79 L.Ed.2d 790, 104 S. Ct. 1473; *World-Wide Volkswagen Corp. v. Woodson, supra,* at 299, 62 L.Ed.2d 490, 100 S. Ct. 559, or of the "unilateral activity of another party or a third person," *Helicopteros Nacionales de Colombia, S.A. v. Hall, supra,* at 417, 80 L.Ed.2d 404, 104 S. Ct. 1868. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. *McGee v. International Life Insurance Co.*, 335 U.S. at 223, 2 L.Ed.2d 223, 78 S. Ct. 199; *see also Kulko v. California Superior Court,* 436 U.S. at 94 n.7, 56 L.Ed.2d 132, 98 S. Ct. 1690.

Burger King, 471 U.S. at 475 (emphasis in original; footnotes omitted).

WEDGE has never directly conducted business, held title to property, or retained employees in Tennessee. Nonetheless, it has performed various acts in Tennessee and established various contacts with the state. First, from

1978 to 1986, WEDGE was the 100% owner of TRC, a corporation that, along with its own subsidiaries, conducted business in Tennessee.[1] Second, WEDGE was not a mere passive owner of TRC; from 1982 to 1986 WEDGE officers served as TRC directors and met regularly—as often as monthly—in Tennessee to review and direct TRC's operations. Third, WEDGE was a party to the Tax Sharing Agreement with TRC and TRC's subsidiaries, under which WEDGE shared income tax liability with these Tennessee companies. Fourth, in 1985, WEDGE officers particiated in negotiations between Third National and TRC regarding the Third National-TRC third amended loan agreement, and, in order to induce Third National to enter the amended loan agreement, WEDGE deposited $7.5 million in a checking account maintained at a Third National branch in Tennessee. Fifth, in 1986 WEDGE entered the "Tax Receivable Agreement" with Third National and TRC. This agreement, which directly addresses potential liability of WEDGE to TRC—and, therefore, to Third National—was executed in Tennessee.

We have no hesitancy in concluding that, by these actions and contacts, WEDGE "purposefully availed" itself of acting and causing consequences in Tennessee and that its contacts with the state were not "random," "fortuitous," "attenuated," nor the result of "the unilateral ac-

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1. We reject WEDGE's argument that, to the extent its contacts with Tennessee arose from its ownership interest in TRC, the contacts do not "count" for personal jurisdiction purposes. This court has held that the ownership of a subsidiary that conducts business in the forum is "one contact or factor to be considered in assessing the existence or non-existence of the requisite minimum contacts." *Velandra v. Regie Nationale des Usines Renault*, 336 F.2d 292, 297 (6th Cir. 1964).

tivity of another party." Therefore, we hold that the first *Southern Machine* criterion is satisfied.

B.

The second *Southern Machine* requirement is that "the cause of action must arise from the defendant's activities" in Tennessee. WEDGE argues that this requirement is not satisfied because Third National's cause of action to enforce its rights as a secured creditor of TRC arose from the Tax Sharing Agreement, which was executed in Texas and is governed by Texas law, or from the Third National-TRC loan agreement, and not from WEDGE's activities in and contacts with Tennessee.

WEDGE's argument misses the mark. In *Southern Machine,* this court made clear that the second criterion does not require that the cause of action formally "arise from" defendant's contacts with the forum; rather, this criterion requires only "that the cause of action, of whatever type, *have a substantial connection with* the defendant's in-state activities." 401 F.2d at 384 n.27 (emphasis added); *cf Lanier v. American Board of Endodontics,* 843 F.2d 901, 909 (6th Cir.) (holding that "arising out of" requirement of state long-arm statute was satisfied if the cause of action was "made possible by" or "lies in the wake of" the defendant's state contacts), *cert. denied,* 109 S. Ct. 310 (1988). "Only when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that [contact]." 401 F.2d at 384 n.29.[2]

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2. In *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408 (1984), the Supreme Court expressly declined to reach the questions

> (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a

We are satisfied that Third National's cause of action against WEDGE to enforce its rights under its security agreement with TRC has "a substantial connection with" and is "related to" WEDGE's contacts with Tennessee. The following contacts in particular have a close relationship with Third National's action: WEDGE entering the Tax Sharing Agreement—the source of the claimed liability of WEDGE to TRC, and therefore to Third National —with TRC, a Tennessee corporation; WEDGE interjecting itself in negotiations between Third National and TRC regarding the Third National-TRC third amended loan agreement, and depositing $7.5 million in a Tennessee bank account maintained at Third National to

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> defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contact with a forum is necessary to a determination that either connection exists.

466 U.S. at 415 n.10. The law of this circuit—that the "arising from" requirement is satisfied if the cause of action is "related to" or "connected with" the defendant's forum contacts—is consistent with the Supreme Court's language in *International Shoe*:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of *or are connected with* the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

326 U.S. at 319 (emphasis added); *see also Helicopteros Nacionales*, 466 U.S. at 427 ("Limiting the specific jurisdiction of a forum to cases in which the cause of action formally arose out of the defendant's contacts with the State would subject constitutional standards under the Due Process Clause to the vagaries of the substantive law or pleading requirements of each State.") (Brennan, J., dissenting). This circuit's position is also consistent with that taken by at least two other circuits. *See City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 487 (4th Cir. 1985); *Southwire Co. v. Trans-World Metals & Co.*, 735 F.2d 440, 442 (11th Cir. 1984); *see also* Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610 662-63 (1988).

induce Third National to enter the amended loan agreement; and WEDGE entering, with Third National and TRC, the Tax Receivable Agreement in Tennessee, under which the parties stated their purported rights under the Third National-TRC loan agreement. We therefore hold that the second *Southern Machine* requirement is satisfied.

C.

The final *Southern Machine* requirement is that "the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." This requirement involves

> a determination of whether Tennessee has an interest in resolving the conflict at issue; but, once the first two questions have been answered affirmatively, resolution of the third involves merely ferreting out the unusual cases where that interest cannot be found.

Southern Machine, 401 F.2d at 384. This court has stated that "[w]hen the first two elements are met, an inference arises that the third, fairness, is also present; only the unusual case will not meet this third criterion." *First National Bank v J. W. Brewer Tire Co.*, 680 F.2d 1123, 1126 (6th Cir. 1982). As the Supreme Court recently stated,

> where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of

> finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another State may be accommodated through application of the forum's choice-of-law rules.

Burger King, 471 U.S. at 477.

WEDGE sets forth no considerations that would render the exercise of personal jurisdiction over it in Tennessee unreasonable. Tennessee has interests in resolving this case, not the least of which is to provide a forum for the adjudication of a dispute between a resident and a nonresident that has purposefully availed itself of acting in and causing consequences in Tennessee. Any interest Texas may have in this case, as the result of the parties signing the Tax Sharing Agreement in Texas and providing that it would be governed by Texas law, may be accommodated by application of Texas law, if appropriate. We hold that the third *Southern Machine* requirement is satisfied.

Because we conclude that the three-part *Southern Machine* test is satisfied, we hold that WEDGE is subject to personal jurisdiction in Tennessee in this action. Accordingly, the judgment of the district court is REVERSED and the case is REMANDED for further proceedings.

KEITH, Circuit Judge, concurring. I agree with the majority's assessment that in the present case, defendant WEDGE is subject to personal jurisdiction in Tennessee. I write separately, however, to express my views on the substantial due process issues that arise when jurisdiction over a corporate parent, such as WEDGE, is obtained by virtue of jurisdiction over a wholly-owned subsidiary, such as TRC.

On appeal, WEDGE argues that its alleged contacts with Tennessee arose solely from its ownership of TRC. In addition, WEDGE contends that it should not be required to respond to a Tennessee lawsuit on the sole ground that its subsidiary, TRC, conducted business in Tennessee. The majority opinion dismisses WEDGE's arguments in an initial footnote, stating that:

> This court has held that the ownership of a subsidiary that conducts business in the forum is "one contact or factor to be considered in assessing the existence or non-existence of the requisite minimum contacts." *Velandra v. Regie Nationale Des Usines Renault,* 336 F.2d 292, 297 (6th Cir. 1964).

The majority then proceeds to resolve the issues raised by the present action solely under the standards set forth by this court in *Southern Machine Co. v. Mohasco Industries, Inc.,* 401 F.2d 374 (6th Cir. 1968). It is on this point that my views tend to differ with those of the majority. I am of the opinion that the present case is governed by this court's holding in *Velandra v. Regie Nationales Des Usines Renault,* 336 F.2d 292 (6th Cir. 1964). Thus, differing from the approach of the majority, I would emphasize and apply the *Velandra* rule for determining when jurisdiction may be properly obtained through the parent-subsidiary relationship.

In *Velandra,* the plaintiffs sued for damages sustained in an automobile accident caused by the defective brakes in a Renault automobile manufactured in France by an initial defendant, Regie, and imported into the United States by a second defendant, Renault, before ultimate sale to the plaintiffs in Ohio, 336 F.2d at 295. Plaintiffs urged that the defendants were amendable to suit in

Michigan because Regie, the manufacturer, owned 100% of the stock of Renault, the importer, and Renault, in turn, owned 100% of the stock of Great Lakes, the Michigan distributor. *Id.* at 296. Rejecting plaintiffs' arguments, this court concluded that:

> [T]he ownership of the [Great Lakes] subsidiary carrying on local activities in Michigan represents merely one contact or factor to be considered in assessing the existence or non-existence of the requisite minimum contacts with the State of Michigan, *but is not sufficient of itself to hold the present foreign corporations amenable to personal jurisdiction.*

Id. at 297 (emphasis added).

To resolve such personal jurisdiction issues, this court initially relied upon the early case of *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), where the Supreme Court held that the activities of a subsidiary did not subject its parent corporation to the personal jurisdiction of a local court. *See id.* at 337. We subsequently distinguished the *Cannon* rule in our *Velandra* decision, explaining that foreign parent corporations have been properly held amenable to the "personal jurisdiction of local courts because of the local activities of subsidiary corporations upon the theory that the corporate separation is fictitious, or that the parent has held the subsidiary out as its agent, or . . . that the parent exercised an undue degree of control over the subsidiary." *Velandra,* 336 F.2d at 296 (citations omitted). *See also Nixon v. Celotex Corp.*, 693 F.Supp. 547, 551 (W.D. Mich. 1988) (following *Velandra* to conclude that foreign parent corporation's active participation in local subsidiary's personnel, pension and sales decisions justified exercise of specific jurisdiction over parent).

In the aftermath of our *Velandra* decision, the Fifth Circuit has consistently ruled that so long as a parent corporation and its subsidiary maintain separate and distinct corporate entities, the presence of one in a local forum may not be attributed to the other. *See, e.g., Bearry v. Aircraft Corp.*, 818 F.2d 370, 372-73 (5th Cir. 1987).

In *Southmark Corp. v. Life Investors, Inc., and USLICO Corp.*, 851 F.2d 763 (5th Cir. 1988), the plaintiff contended that even though defendant USLICO had no offices, real property, bank accounts, advertisements, employees, or service providers in Texas, USLICO was, nonetheless, amenable to suit in Texas. Plaintiffs argued that "USLICO's subsidiaries that do business in Texas are alter egos or agents of USLICO and that the general jurisdiction that Texas courts have over the subsidiaries may be imputed to USLICO." *Southmark Corp.*, 851 F.2d at 773. The Fifth Circuit, however, rejected plaintiff's contentions and accepted the district court's findings that USLICO's subsidiaries: (1) kept separate books and bank accounts; (2) filed income tax returns separate from USLICO; (3) were managed by separate boards of directors that had overlapping, but not identical, memberships with USLICO; and (4) were centrally managed by the officers of the largest USLICO subsidiary, but not the officers of USLICO. *See id.* at 773. Thus, the Fifth Circuit held that where "a wholly owned subsidiary is operated as a distinct corporation, its contacts with the [local] forum cannot be imputed to the [foreign] parent. Since USLICO has no other systematic and continuous contacts with Texas, we conclude that general jurisdiction does not exist." *Id.* at 773-74. *See also Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983) (demanding "proof of control by the parent over the internal business

operations and affairs of the subsidiary in order to fuse the two for jurisdictional purposes.").

After evaluating these principles of law and the contentions of the parties, I would emphasize and apply this court's *Velandra* rule: where the "corporate separation is fictitious," jurisdiction may be properly obtained through the parent-subsidiary relationship. *Velandra,* 336 F.2d at 296. I would then update and refine the *Velandra* rule, holding that a plaintiff seeking to establish jurisdiction over a defendant foreign parent corporation by virtue of jurisdiction over its local subsidiary must prove: (1) *attribution,* "that the absent parent instigated the subsidiary's local activities;" or (2) *merger,* "that the absent parent and the subsidiary are in fact a single legal entity." Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency,* 74 Calif. L. Rev. 1, 12 (1986).

In the present case, I am persuaded that WEDGE, the foreign corporate parent, failed to operate TRC, its subsidiary doing business in the local forum, as a distinct legal entity. For jurisdictional purposes, I would define the alleged separate legal relationship between WEDGE and TRC as entirely fictitious. *See Velandra,* 336 F.2d at 296. Thus, in my opinion, because WEDGE effectively consummated a *merger* with TRC, traditional notions of fair play and substantial justice are not offended by holding WEDGE accountable for TRC's conduct in Tennessee, the local forum. *See Rush v. Savchuk,* 444 U.S. 320, 327 (1980); *Southmark Corp.,* 851 F.2d at 773-74; *Velandra,* 336 F.2d at 296; Brilmayer & Paisley, *supra,* at 12. *Cf. Nixon,* 693 F.Supp. at 551 ("There may be some situations where a subsidiary could not be considered

an agent or alter ego under corporate law, but it would nonetheless be fair to subject the parent to jurisdiction for some [of] its subsidiary's activities.").

Because WEDGE failed to maintain a corporate identity separate from TRC, the record provides ample justification for Tennessee to obtain jurisdiction over WEDGE by virtue of its undisputed jurisdiction over TRC. First, WEDGE did not maintain financial records, bank accounts or corporate assets separate from those of TRC. Instead, to induce Third National to restructure its loans to TRC, WEDGE contributed $7.5 million to TRC, in exchange for TRC stock, to be treated as TRC capital. In addition, WEDGE established a new account, on behalf of TRC, at Third National's Nashville, Tennessee branch. *Compare Hargrave,* 710 F.2d at 1160 (declining to find jurisdiction over corporate parent through its subsidiary where separate bank accounts, budgets and financial records were kept to maintain separate corporate identities). Second, WEDGE failed to file federal income tax returns separate from those filed by TRC. Upon review of the TRC-WEDGE Tax Sharing Agreement, the magistrate found that WEDGE obtained a written agreement from TRC that they would file a joint tax return. Moreover, the agreement stated that WEDGE would obtain the tax benefits in Tennessee. *Compare Southmark Corp.,* 851 F.2d at 773 (declining to find jurisdiction over corporate parent through its subsidiary where separate federal income tax returns were filed). Third, WEDGE failed to maintain corporate officers different from those of TRC. The magistrate found that the President and Executive Vice President of WEDGE entered into negotiations with Third National to secure additional credit for TRC. During the course of the nego-

tiations, Third National was assured that the WEDGE officers would control the disbursement of TRC funds and would remain actively involved in the management of TRC. *Compare Hargrave*, 710 F.2d at 1160 (declining to find jurisdiction through the parent-subsidiary relationship where the two companies were independently managed and shared no common officers).

On these relevant facts, I conclude that the corporate separation between WEDGE and TRC was fictitious. Thus, because the present action concerns TRC's Tennessee conduct, which WEDGE controlled, WEDGE should be held accountable for TRC's contacts in Tennessee. Accordingly, I concur in the result reached by the majority.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DOCKET NO. 3-87-0859

THIRD NATIONAL BANK IN
NASHVILLE, TENNESSEE

v.

WEDGE GROUP INCORPORATED

ORDER

Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) (Supp. 1986), and Rules 302 and 303, L.R.M.P. (1985), this case is hereby referred to the Magistrate for determination of any pretrial matters arising in this case.

Entered this the 12th day of January, 1988.

/s/ JOHN T. NIXON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:87-0859

Judge Nixon/Judge Haynes

THIRD NATIONAL BANK IN NASHVILLE,
Plaintiff,

v.

WEDGE GROUP INCORPORATED,
Defendant.

REPORT AND RECOMMENDATION

I. INTRODUCTION

This case was referred to the Magistrate by the Honorable John T. Nixon, District Judge, by Order dated January 5, 1988. (Docket Entry No. 11). The Magistrate was directed to determine any pretrial matters arising in this case. Pending before the Court is the defendant's motion to dismiss for lack of personal jurisdiction that is supported by an affidavit.[1] The plaintiff has filed a

1. Third National has a companion action, *Third National Bank in Nashville v. Wedge Group, Inc.*, No. 3:87-0860 (M.D. Tenn. filed November 11, 1987) that also seeks recovery from Wedge Group Incorporated (Wedge) for the loan defaults of its subsidiary, The Rodgers Company (TRC). Although Wedge's motion to dismiss was filed only in Case No. 3:87-0860, it is considered by the parties as filed as to complaints in both actions. (See Case No. 3:87-0859, Docket Entry No. 9). As the Magistrate understands these actions, Case No. 3:87-0860 involves recovery based solely upon the loan and security agreements between Third National and TRC as well as a tax letter agreement between TRC, Wedge and Third National. (Case

response that also includes affidavits as well as documentary evidence. (Docket Entry Nos. 3, 4, 5 and 6). The plaintiff requested oral argument on the defendant's motion that was granted. By agreement of the parties, oral argument was held on February 26, 1988.

Plaintiff Third National Bank in Nashville (hereinafter "Third National") brings this diversity action under 28 U.S.C. § 1332(a) to recover $2,568,983, attorney's fees and costs against Wedge Group Incorporated (hereinafter "Wedge"), a Delaware corporation with its principal place of business in Houston, Texas. Third National's claim arises out of various loan and security agreements between Third National and the former Rodgers Companies, Inc. (hereinafter "TRC"),[2] a former Wedge subsidiary as well as a tax sharing agreement between TRC and Wedge. In this action, Third National asserts that TRC defaulted on loans that were extended by Third National and under the Wedge-TRC Tax Sharing Agreement, Wedge possesses certain TRC assets to which Third National claims it is entitled. These are monies derived

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No. 3:87-0860 Docket Entry No. 1, Complaint, p. 3, ¶¶ 5 and 6). Third National seeks $862,265 attorney's fees and costs in that action. *Id.* In contrast, in this action, Third National's recovery is based upon the loan and security agreements between TRC and Third National as well as a Tax Sharing Agreement between TRC and Wedge. (See Case No. 3-87-0859 Docket Entry No. 1, Exhibit D thereto). In each instance, Third National claims arise under or related to Wedge's contacts and activities in Tennessee. Thus, in both actions, the issue is whether these contacts are sufficient for the exercise of "specific jurisdiction" over Wedge. See *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414, nn.8 and 9, 104 S. Ct. 1868, 80 L.Ed.2d 404 (185). A separate Report and Recommendation in Case No. 3:87-0860 has been filed. The cases have not been consolidated.

2. As discussed *infra, The* Rodgers Holdings, Inc. (TRH) is the successor to the former The Rodgers Companies (TRC), also referred to as The Rodgers Group (TRG).

from TRC tax benefits that were pledged to Wedge, TRC's corporate parent, for tax purposes. These monies are sought to satisfy TRC's deficiencies under loans that were extended to TRC by Third National. In its motion to dismiss, Wedge asserts that the facts show that Wedge has no offices or sufficient contacts with Tennessee to allow this Court to assert personal jurisdiction over Wedge in this dispute.

For the reasons set forth below, the Magistrate recommends that Wedge's motion to dismiss be denied. The Magistrate finds that there is sufficient evidence in opposition to this motion to show that Wedge has had substantial and continuous contacts with TRC and Third National in Tennessee and Wedge has had fair notice that it could be haled into a Tennessee court. Thus, Third National has satisfied the requirements of the Due Process Clause of the Fourteenth Amendment for the District Court's assertion of *in personam* jurisdiction over Wedge.

II. ANALYSIS OF THE MOTIONS

A. Findings of Fact[3]

The factual bases for Wedge's claim that this court lacks *in personam* jurisdiction over it are set forth in the

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3. In light of the parties' affidavits, Wedge's motion to dismiss is treated as a motion for summary judgment. (Rule 12(b), F.R.Civ.P.) Upon a motion for summary judgment the factual contentions are viewed in the light most favorable to the party opposing the motion for summary judgment. *Duchon v. Cajon Co.*, 791 F.2d 43 (6th Cir. 1986) *app.* 840 F.2d 16 (6th Cir. 1988). As will be discussed *infra*, under recent Supreme Court holdings, upon the filing of a motion for summary judgment, the opposing party must come forth with sufficient evidence to support the challenged claim, *Anderson v. Liberty Lobby*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S. Ct. 2505 (1986), particularly where there has been an opportunity for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 276, 106 S. Ct. 2548 (1986).

affidavit of Don Williams (hereinafter "Williams"), Wedge's Vice-President. According to Williams:

> I was a Director of the Rodgers Companies, Inc. ("Rodgers") at various times from 1978 until 1986.
>
> Rodgers was a subsidiary of WEDGE from 1978 until 1986.
>
> To the best of my knowledge, none of the officers or directors of WEDGE were at any time an officer of Rodgers.
>
> WEDGE has never held title to property in Tennessee. Nor has WEDGE directly maintained officers, a mailing address or phone listings, or directly retained employees in Tennessee.
>
> A WEDGE owned company, Paragon Industries Corporation, a Delaware corporation, had a manufacturing facility located in Tennessee through its subsidiary, Gilson Brothers Company. However, like Rodgers, Paragon and Gilson are completely autonomous from WEDGE in their day-to-day operations.
>
> At all material times, Rodgers operated autonomously of its parent, WEDGE, as well as its sister corporations. Rodgers had sole responsibility for all of its relations with customers, supplies, legal counsel, banks and public accountants.
>
> At all material times, the business and financial affairs of Rodgers and WEDGE were carried out in strict observance of all corporate formalities, maintaining the integrity of each as a separate and distinct corporate entity. WEDGE and Rodgers maintained separate bank accounts, accounting and payroll systems, budgets, and financial records. Day-to-day business and operational decisions for Rodgers were made strictly by officers of Rodgers.

(Docket Entry No. 6).

Third National identified the following facts to demonstrate Wedge's Tennessee contacts. From 1982 to 1986, Third National made loans to the Rodgers Companies (TRC, also referred to as the Rodgers Group (TRG)), a Delaware corporation with its principal place of business in Nashville, Tennessee. (Docket Entry No. 10, Affidavit of Michael Kane, p. 1, ¶ 2). Rodgers Construction Company, Inc. of Nashville (RCI) was a wholly owned subsidiary of TRC. (Docket Entry No. 9, Affidavit of Gerald H. Johnson, p. 1, ¶ 2). Both TRC and RCI were in the construction business in Tennessee and other states. *Id.* ¶ 3. TRC and RCI were subsidiaries of Wedge until June, 1986.

The original TRC-Third National loan agreement was executed in 1982, but was amended on several occasions. The terms of the latest TRC-Third National loan agreement are reflected in the Fourth and Fifth Amendments thereto that provide, in pertinent part:

> FOURTH AMENDMENT TO
> LOAN AGREEMENT
>
> WHEREAS, the purpose of this Agreement is to amend and restate that certain Loan Agreement dated as of May 7, 1982, as amended by a First Amendment to Loan Agreement and Loan Documents dated as of January 20, 1983, by a Second Amendment to Loan Agreement and Loan Documents dated as of July 11, 1983 and by a Third Amendment to Loan Agreement and Loan Documents dated as of June 5, 1985, by and among certain of the parties, and all related loan documents (i) to extend and modify the Existing Loans and (ii) to provide for an additional Guaranteed Loan in the amount of up to $10,000,000.
>
> * * *

"Affiliate" shall mean a person, firm or corporation (other than a Subsidiary)" (i) which directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, the Borrower, (ii) which beneficially owns or holds 5% or more of any class of the Voting Stock of the Borrower, or (iii) 5% or more of the Voting Stock (or in the case of a person which is not a corporation, 5% or more of the equity interest) of which is beneficially owned or held by the Borrower or a Subsidiary or another Affiliate. The term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, firm or corporation whether through the ownership of voting securities, by contract or otherwise.

* * *

"Current Assets" shall mean, with respect to any Person, as of any date of determination, all asserts of such Person which in accordance with generally accepted accounting principles would be classified as current assets after deduction of all reserves properly deductible from such assets in accordance with generally accepted accounting principles.

* * *

ARTICLE VII: *NEGATIVE COVENANTS*

Borrower covenants and agrees that, during the term of this Agreement and any extension hereof and until the Obligations have been paid and satisfied in full, unless Lender shall otherwise first consent in writing, Borrower will not, either directly or indirectly:

* * *

Section 7.14 *Disposition of Assets.* Dispose of any of its assets other than pursuant to Borrower's pro-

posed Asset Disposition Plan; provided, the Borrower may dispose of nonmaterial assets in isolated transactions involving, in the aggregate, less than $5,000. All dispositions of Collateral must be approved by Lender in writing in advance of such disposition.

FIFTH AMENDMENT TO LOAN AGREEMENT

WHEREAS, the purpose of this Agreement is to amend that certain Fourth Amendment to Loan Agreement dated as of February 21, 1986 ("Loan Agreement");

* * *

2. Section 2.02 of the Loan Agreement is deleted and amended in its entirety to read as follows:

Section 2.02 *Restructuring of Existing Loans.*

(a) The $10,000,000 Guaranteed Loan Note and the $7,500,000 Note shall be secured exclusively by the Collateral excluding the items on Exhibit D, but including, without limitation, (i) 100% of the common stock of RCI ("RCI Stock"), (ii) all of Borrower's equipment, machinery, parts and accessories and proceeds thereof (excluding leased equipment), (iii) all of Borrower's accounts and accounts receivable and proceeds thereof (other than any and all amounts owed by Wedge Groups, Inc. and/or any affiliated company therewith to TRC or any company affiliated with TRC ("Wedge Receivable")). . .

* * *

EXHIBIT D

BANK COLLATERAL SECURING BANK DEBT

1. The Wedge Receivable as defined in 2.02(a).

(Docket Entry No. 1, Complaint, Exhibit B thereto). The security agreement for these loans provided, in pertinent part:

Section 1. Security Interest. As security for the payment of the indebtedness more particularly described in Section 2 of this Security Agreement, Debtor hereby assigns and grants to Secured Party a security interest in and to the following described property (hereinafter sometimes referred to as the "Collateral"):

(a) All of Debtor's existing equipment, machinery parts and accessories and all of Debtor's equipment, machinery parts and accessories which may be acquired during the term of this Agreement;

(b) All proceeds (including insurance proceeds) or products attributable to or arising from any of the foregoing Collateral;

* * *

Section 15. Applicable Law. This Security Agreement is being delivered and is intended to be performed in the State of Tennessee and shall be construed and enforced in accordance with and governed by the substantive law of such State.

Id., (Exhibit C thereto).

As early as 1985, Wedge representatives became more involved in TRC and RCI's financial dealings, including TRC's loans with Third National. This involvement included personal visits to monitor TRC's financial dealings and to negotiate the payments of TRC debt. Wedge representatives also engaged in negotiations in Tennessee that involved the transfer and sale of TRC stock. This stock transaction was part of TRC's efforts to restructure its loans with Third National. Gerald H. Johnson, Vice President of TRG, describes these events as follows:

6. Representatives of Wedge have been involved in the relationship between TRG, RCI and Third National. *During periods in the late 1985 and 1986, Don Williams, on behalf of Wedge, spent extended periods of time in Nashville, reviewing the receivables and payables held by TRG and RCI and setting up a cash reporting system.*

7. *In early 1986, TRG and its subsidiaries began having serious financial problems. In the course of working out those problems with Third National, TRG management began negotiations with Wedge for the purchase of the stock of TRG held by Wedge and/or Wedge related entities.*

8. James Bennett and other TRG management personnel planned to form a corporation to act as purchaser (the "Buyer") which sent representatives to Nashville to review TRG's financial position for the purpose of determining whether the stock should be sold and setting a purchase price.

9. *A letter agreement regarding the sale of the stock was entered into by Wedge and James Bennett, among others, in February 1986.* The letter agreement provided for Wedge's sale of its common stock, the exchange of its preferred stock, and essentially for the transfer of control over TRG.

10. *After the signing of the letter agreement, negotiations continued regarding the final form of the stock purchase agreement to be entered into between the Buyer and Wedge. Mr. William Heiligbrodt was Wedge's key representative in these negotiations and James Bennett was the main representative of the Buyer. Mr. Heiligbrodt visited Nashville for a meeting of the officers of Dearborn and Ewing, attorneys for the Buyer and Mr. Bennett, regarding the proposed stock purchase agreement. This meeting, held in late May or early June of 1986, essentially amounted to a pre-closing of the stock purchase agreement, eventually executed on June 4, 1986.*

> 12. Mr. Heiligbrodt visited Nashville to finalize the details of the tax receivable agreement and the stock purchase agreement in May, 1986. (Emphasis added).

(Docket Entry No. 9, Johnson Affidavit, pp. 2-3).

Moreover, James Bennett, Chairman of the Board and President of T.R. Holdings, Inc. (TRH), the corporate successor to TRC, stated that several of Wedge's directors and officers were also directors of RCI and TRG.[4] For several years, these officers regularly visited Nashville on a monthly basis to discuss TRC's management and financial condition. In one instance, Wedge's president took part in these meetings in Nashville. According to Bennett.

> . . . James Kaufman, Dan Feehan and Don Williams, at various times between 1980 and 1986, acted as directors of both Wedge and of RCI and TRG.
>
> 8. *During the period of time from 1980 to 1984, approximately, Wedge officers met monthly in Nashville, with TRG and RCI management personnel, to review, discuss and direct the operations and financial activities of TRG, RCI and their respective subsidiaries. Mr. Feehan, a Vice President of Wedge, and Mr. Kaufman, President of Wedge, were regularly present in Nashville for these meetings.*
>
> 9. Beginning in late 1984 or early 1985, these meetings were held less often, but Wedge senior management personnel were present in Nashville three to four times per year to discuss the on-going operations

4. The Williams affidavit that was submitted by Wedge states only that none of Wedge's directors or officers were officers of TRC. In a word, there is no factual conflict on this issue.

> of TRG and RCI and their subsidiaries. Dick Blohm, then President of Wedge, and Don Williams, his immediate subordinate, were regularly present in Nashville at these meetings.
>
> 10. *The Tax Letter Agreement that is the subject of this law suit was executed by Wedge and by TRG and its subsidiaries in December, 1983.* (Emphasis added).

(Docket Entry No. 8, pp. 2-3). The Tax Letter Agreement is discussed in more detail in *Third National Bank v. Wedge Group, Inc.*, No. 3:87-0860 (Report and Recommendation filed April 29, 1988), but significant here, is that this Tax Letter Agreement was executed in Tennessee and was to be governed by the laws of Tennessee. (Docket Entry No. 10, Kane Affidavit, Exhibit A, p. 3).

As noted, TRC experienced serious financial problems. These problems included its failure or inability to make payments on its loans from Third National. According to Michael Kane, Third National's vice president, beginning in or about April, 1985 and continuing until early 1986:

> *Wedge representatives and TRG representatives requested that Third National continue to extend credit to TRG and its subsidiares, in spite of the worsening financial position of these companies.* Dick Blohm, Executive Vice President of Wedge, and William Heiligbrodt, President of Wedge, entered into negotiations with Third National. These negotiations resulted in the execution of a third amendment to the loan agreement dated as of June 5, 1985, executed by Third National and by TRG and its subsidiaries.

> To induce Third National to enter into the Third Amendment, Wedge agreed to contribute and did contribute $7,500,000 in cash to TRG, in exchange for TRG stock, to be treated as capital on TRG's books. *Wedge established a new checking account at Third National, in Nashville, to be used in the ordinary course of business of TRG* and its subsidiaries and to act as additional collateral for Third National loans. *Certain officers of Wedge, includng Don Wilson, were the only persons authorized to direct disbursements* from the account.
>
> *Wedge representatives repeatedly assured Third Na-National that Wedge supported TRG and that Heiligbrodt and Mr. Blohm would be actively involved at TRG and work closely with Mr. Bennett.*
>
> Wedge's position in the management of TRG was so important to Third National that *the Third Amendment* [to the Third National-TRC Loan Agreement] *specifically provided that any material change in Wedge's direct or indirect control of TRG would constitute an event of default under the loan agreement.* (Emphasis added).

(Docket Entry No. 10, pp. 2-3).

The apparent focus of this action is the TRC-Wedge Tax Sharing Agreement. As noted, Wedge, as the corporate parent, obtained a written agreement from its subsidairies, including TRC, that there would be a joint federal tax return. In essence, Wedge would obtain the tax benefits or assume the tax burden of any of TRC's activities, including activities in Tennessee. In pertinent part, the TRC-Wedge Tax Sharing Agreement provides as follows:

> THIS AGREEMENT effective as of *October 1, 1980,* between WEDGE Group Incorporated, a

Delaware corporation ("WEDGE"), the corporation which has executed this Agreement as Parent Company on the signature page hereof ("Parent"), and the corporation or corporations which have executed this Agreement as Subsidiary Company or Subsidiary Companies on the signature page hereof ("Sub"); . . .

WHEREAS, WEDGE, is the common parent corporation of an affiliated group of corporations (as defined in Section 1504(a) of the U. S. Internal Revenue Code of 1954, as amended (the "Code")), which includes, without limitation, (i) WEDGE as the common parent corporation, (ii) Parent, and (iii) Sub; and

WHEREAS, The Consolidated Group (as hereinafter defined) proposes to elect to file consolidated federal income tax returns under Section 1501 of the Code, so that the tax liability of the Consolidated Group will be determined under Section 1502 of the Code and the Regulations thereunder by consolidating the income, expenses, gains, losses and credits of all of the members of the Consolidated Group; and

WHEREAS, WEDGE desires to include Parent and Sub as members of the Consolidated Group; and

WHEREAS, WEDGE, Parent and Sub wish to enter into this Agreement to set forth their understanding as to certain matters pertaining to their federal income tax liabilities;

* * *

. . . WEDGE shall designate to [TRC] in writing the method (specified in Section 6655 of the Code) to be used by [TRC] in making estimated tax computations for such Consolidated Return Year. . .

* * *

(b) If such Hypothetical [TRC] Group Return reflects a hypothetical federal income tax liability of the [TRC] Consolidated Group for such Consolidated Return Year, and if the aggregate of all amounts paid to WEDGE by [TRC] pursuant to Section 3 hereof in respect of such Consolidated Return Year exceeds that amount of such hypothetical federal income tax liability, then WEDGE shall pay to [TRC] within 90 days after such Consolidated Return Date, the amount of such excess.

(c) If such Hypothetical [TRC] Group Return reflects no hypothetical federal income tax liability of the [TRC] Consolidated Group for such Consolidated Return Year, and if [TRC] has made any payments to WEDGE pursuant to Section 3 hereof in respect of such Consolidated Return Year, then WEDGE shall pay to [TRC] within 90 days after such Consolidated Return Date, an amount equal to all such payments previously made to Wedge by [TRC] pursuant to Section 3 hereof.

(d) If such Hypothetical [TRC] Group return reflects a net operating loss and covers either the first or second Consolidated Return Year during which [TRC] is a member of the Consolidated Group, then WEDGE shall pay to [TRC] on such Consolidated Return Date, an amount equal to the maximum rate applicable to that Consolidated Return Year presented in Section 11, Part II, Subchapter A, Chapter 1 of the Code times the amount of the net operating loss reflected on such Hypothetical [TRC] Group Return (ignoring any net operating loss carryovers to such Consolidated Return Year) which WEDGE in its sole judgment determines can be utilized in the Consolidated Group Return for such Consolidated Return Year or for a prior Consolidated Return Year. Such payment by WEDGE shall be in the form of a promissory note

executed by WEDGE to the order of [TRC], payable without interest. . .

* * *

5. *Prior Years' Refunds.* . . . If such computation reflects any hypothetical refunds owed to [TRC] then WEDGE shall pay to [TRC], on such Consolidated Return Date, an amount equal to the amount of such hypothetical refunds; provided, however, that WEDGE, at its option, may defer payment of such amounts until such time as the IRS or the courts shall have made a final determination of the related Group Refund Claim, if any, filed by WEDGE.

6. *Adjustments after Deconsolidation.* . . . Wedge shall file such Group Refund Claim with the IRS on or before the expiration of the statute of limitations with respect thereto. Upon the receipt by WEDGE of any refund relating to such refund claim, WEDGE shall pay to [TRC] the lesser of (i) the reduction of the Consolidated Group tax liability as a result of the tax attribute originating with the Parent Consolidated Group or (ii) the amount of refund the Parent Consolidated Group would have received if it had filed separate consolidated tax returns for all Consolidated Return Years (based upon the law and facts as finally determined in connection with such Group Refund Claim).

Id., Exhibit D, pp. 1, 4-9.

III. CONCLUSIONS OF LAW

Upon a motion to dismiss for lack of personal jurisdiction, a district court may rely on the submission of affidavits or conduct an evidentiary hearing under Rule 12(d) of the Federal Rules of Civil Procedure. *Welsh v. Gibbs,* 631 F.2d 436, 438 (6th Cir. 1980) *cert. den.* 450 U.S.

981, 101 S. Ct. 1517, 67 L.Ed.2d 816 (1981); *Lemme v. Wine of Japan Import, Inc.*, 631 F.Supp. 459, 456 (E.D. N.Y. 1986); 2A Moore's *Federal Practice*, § 12.07 (2d Ed. 1985). If an evidentiary hearing is not held, then the Court must view the pleadings and affidavits in the light most favorable to the plaintiff. *Welsh v. Gibbs*, 631 F.2d at 439. Here, neither party requested a hearing and each party submitted affidvaits. In any event, Third National need only make a *prima facie* showing that jurisdiction exists and all of the party's allegations of jurisdictional facts are presumed true and all factual disputes are decided in Third National's favor. *Nelson v. Park Industries, Inc.*, 717 F.2d 1120, 1123 (7th Cir. 1983); *Welsh v. Gibbs*, 631 F.2d at 436. Here, the burden is upon Third National to prove by a preponderance of the evidence that the Court has personal jurisdiction over Wedge. *Id.*

Although the TRC-Wedge Tax Sharing Agreement states that Texas law governs its provisions, in diversity cases, the jurisdictional reach of federal district courts also is to be determined by the law of the state where the district court sits. *Pickens v. Hess*, 573 F.2d 380, 385 (6th Cir. 1978); *Milan Exp. Inc. v. Missie, Inc.*, 575 F.Supp. 931, 933 (W.D. Tenn. 1983). Tennessee's Long Arm Statute subjects nonresident parties to the jurisdiction of state and federal courts that sit in Tennessee on any claim arising from:

> (1) The transaction of any business within the state;
>
> * * *
>
> (4) Entering into any contract of insurance, indemnity, or guaranty covering any person, property,

or risk located within this state at the time of contracting;

* * *

(6) Any basis not inconsistent with the constitution of this state or of the United States;

* * *

(b) *"Person" as used herein shall include corporations* and all other entities which would be subject to service of process if present in this state.

(c) *Any such person shall be deemed to have submitted to the jurisdiction of this state who acts in the manner above described through an agent or personal representative.* (emphasis added).

Tenn. Code. Ann. §§ 20-2-214(a)(1)(4)(c)(b) and (c) (1986). The Tennessee long arm statute is construed to grant jurisdiction only to the limits of Due Process Clause of the Fourteenth Amendment. *Hooks v. Hooks,* 771 F.2d 935, 945, n.9 (6th Cir. 1985); *Pickens v. Hess,* 573 F.2d at 385. The Tennessee Supreme Court has adopted the minimum contact test, under Federal case law noting that: "[T]hree primary factors are to be considered in determining whether the requisite minimum contacts [are] present: the quantity of the contacts, their nature and quality, and the source in connection of the cause of action with those contacts." *Masada Investment Corp. v. Allen,* 697 S.W.2d 332, 334 (Tenn. 1985).

In assessing Wedge's contention that the District Court lacks jurisdiction[5] over it, the Magistrate is guided by

5. The Magistrate notes that there are two types of *in personam* jurisdiction; "specific jurisdiction" and "general jurisdiction". As the Supreme Court noted:

It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defend-

the Supreme Court's decisions that define the requirements and the limits of the Due Process Clause. In a recent decision, *Asahi Metal Ind. v. Superior Court of California, Solano Cty.*, ____U.S.____, 107 S. Ct. 1026, 1031, 94 L.Ed.2d 92 (1987), the Supreme Court concluded that a foreign corporation's placement of a product in stream of commerce without more was insufficient to satisfy the minimum contact test for the exercise of *in personam* jurisdiction under the Due Process Clause of the Fourteenth Amendment.[6] The Supreme Court reiterated that the touchstone determination of whether a District Court's exercise of personal jurisdiction over a foreign corporation comports with due process, is whether the foreign corporation purposefully established minimum contacts in the forum state. The Supreme Court reaffirmed its earlier holding in *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958), involving

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ant's contacts with the forum, the State is exercising "specific jurisdiction" over the defendant. See Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1144-1164 (1966).

When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising "general jurisdiction" over the defendant. See Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 S. Ct. Rev. 77, 80-81; Von Mehren & Trautman, 79 Harv. L. Rev., at 1136-1144; *Calder v. Jones*, 465 U.S. at 786. *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. at 414, nn.8 and 9, 104 S. Ct. 1868, 80 L.Ed.2d 404 (185).

6. In *Hooks, supra*, the Court of Appeals held that the mailing of check to Tennessee as part of the purchase of a Texas business was insufficient to establish sufficient contacts to Tennessee to exercise *in personam* jurisdiction by a District Court in Tennessee. *Hooks*, 771 F.2d at 945. To be sure, a single act creating a "substantial connection" with the forum state can establish *in personam* jurisdiction. *S & S Screw Machine Co. v. Cosa Corp.*, 647 F.Supp. 600, 607 (M.D. Tenn. 1986).

American corporations that such minimum contacts must be evidenced of some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of the forum's state laws. *Asahi Metal,* ____ U.S.____, 107 S. Ct. at 1031, 94 S. Ct. 92. Further the Supreme Court emphasized that

> *The "substantial connection . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State.* (emphasis added).

Asahi Metal, ____U.S.____, 107 S. Ct. at 1032-33 (emphasis in the original and citations omitted).

Although *Asahi* is a more recent decision, the Magistrate finds that a factually more *apropo* decision is the Supreme Court's decision in *Burger King Corporation v. Rudzewicz,* 471 U.S. 462, 85 L.Ed.2d 528, 105 S. Ct. 2174 (1985). There, in a commercial contract context, the Supreme Court outlined and defined the factors for determining whether the District Court possesses personal jurisdiction. In *Burger King,* a Florida District Court, in a diversity action, exercised *in personam* jurisdiction over a Minnesota resident who was a defendant in the Florida action arising out of a contractual relationship, with a Florida franchisor, for the operation of a fast food franchise in Minnesota. Upon review, the Supreme Court upheld the District Court's exercise of jurisdiction in Florida because of the evidence of a substantial and continuing relationship between the parties in Florida.

> *The Due Process Clause* protects an individual's liberty interest in not being subject to the binding

> judgments of a forum with which he has established no meaningful "contacts, ties or relations". By *requiring that individuals have "fair warning" that a particular activity may subject him to the jurisdiction of a foreign sovereign,* the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where the conduct will or will not render them liable to suit.
>
> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, *this fair warning requirement is satisfied if the defendant has "purposefully directed" his activities as resident of the forum, and the litigation results from the alleged injuries that "arise out of or relate to" those activities . . . And with respect to interstate contractual obligations, we have emphasized that parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulations and sanctions in the other states for consequences of their activities."* (Emphasis added).

Burger King Corp. v. Rudzewicz, 471 U.S. at 471-73. [citations omitted].

The Supreme Court also observed that the states have an interest in asserting jurisdiction

> *"where individuals purposely derived benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other states for consequences that arise proximately from such activities;* the due process clause may not readily be welded as a territorial shield to avoid interstate obligations that had been voluntarily assumed." (Emphasis added).

Id. 471 U.S. at 473-74. The Court also noted that the

> "[*j*]*urisdiction is proper however, where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum.* Thus, where the defendant 'literally' has engaged in significant activities within a state, or has created 'continuing obligations' between himself and the residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum laws, it is presumptably not unreasonable to require him to submit to the burdens of litigation in that forum as well". (emphasis added).

Id. 471 U.S. at 475-78. In this analysis, the parties' prior negotiations, course of dealings and terms of any agreement are to be considered. *S & S Screw Machine Co. v. Cosa Corp.*, 647 F.Supp. at 607.

As to Wedge's proof of the absence of offices in Tennessee, the Supreme Court noted that in light of the realities of modern commercial life that physical presence is not required, rather "[s]o long as the commercial actors efforts are 'purposefully directed' towards residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." 471 U.S. at 476.

This Court applied these same basic principles to the Court's assertion of *in personam* jurisdiction over a New York corporate parent whose subsidiary engaged in business in Tennessee. In *Hi-Fi Corner, Inc. v. In Flight Cinema Intern, Inc.*, 505 F.Supp. 13 (M.D. Tenn. 1980), the parent and its subsidiary were in the distribution of

films, but in different customer markets. In its efforts to garner contracts for films to be delivered in Tennessee, the subsidiary relied upon its relationship with the parents' "reputation and resources". *Id.* 505 F.Supp. at 14. Under these facts, this Court held that the parent had sufficient minimum contacts with Tennessee to assert *in personam* jurisdiction over the parent. *Id.* 505 F.Supp. at 15.

In the Magistrate's view, there are sufficient facts here to show that Wedge "purposefully directed" its activities toward the state of Tennessee so as to render Tennessee a fair forum. First, Wedge's corporate tax strategy gave Wedge TRC's tax benefits for activities of TRC and RCI whose central offices were in Nashville. Wedge obtained tax benefits from this arrangement. This purposeful tax strategy created a continuous and substantial relationship between Wedge and TRC's activities in Nashville, thereby satisfying the requirements of the Due Process Clause.

In addition to this tax sharing relationship, Wedge performed other acts, through its officers, in its relation to TRC and Third National. Wedge placed several of its officers as TRC's directors. These officers regularly traveled to TRC for monthly meetings in Nashville in order to monitor TRC's operations and financial status. Moreover, during the period of TRG's financial problems, these Wedge officials engaged in negotiations with Third National officials concerning the restructuring of the TRG loan, including a sale of TRC stock. Wedge infused $7.5 million dollars into TRC and placed these funds into a Third National account that was controlled by Wedge officials. Based on Wedge's infusion of funds, Third National stayed any collection efforts on the TRC

loans. Although some of the Wedge officials, e.g., Williams, may have had a dual role as director of TRC and officer of Wedge, these accounts funds at Third National over which Williams had control were Wedge funds. Thus, in the Magistrate's view, these officers' control of these funds at Third National were in their capacities as Wedge officials.

Under the Due Process Clause standards in *Asahi* and *Burger King*, the Magistrate finds these collective circumstances: (1) the Wedge-TRC Tax Sharing Policy; (2) the Wedge officials visits to Nashville to monitor TRG's financial status; and (3) the Wedge officials numerous visits to Nashville to negotiate the Stock Purchase Agreement in aid of TRG's financial problems on the Third National loans demonstrate that Wedge purposefully availed itself of Tennessee commerce. Third National claims relate to these activities by Wedge. Thus, these collective actions placed Wedge on fair notice that Wedge may be haled into a Tennessee court in connection with these agreements.[7]

IV. RECOMMENDATION

Accordingly, for the reasons stated above, the Magistrate recommends that the defendant's motion to dismiss

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7. The Magistrate notes Wedge's argument that because the Tax Sharing Agreement states that Texas law governs its terms, Wedge did not expect to be haled into a Tennessee court. However, in this, Texas law will apply to the parties' substantive claims under the Tax Sharing Agreement. However, as noted earlier on this *in personam* jurisdiction issue, the law of the forum is the principal guide. Moreover, on this jurisdictional issue, it is Wedge's conduct toward Third National and the TRC-Third National loan and security agreements that are the critical elements rather, these agreements refer to Tennessee law as governing the agreements. (Docket Entry No. 1, Exhibit A, pp. 3-6, Section 10.09).

for lack of personal jurisdiction be denied. Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District Court. Any party opposing said objections shall have ten(10) days from receipt of any objections filed to this Report in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *Thomas v. Arn*, 474 U.S. 140, 88 L.Ed.2d 435, 106 S. Ct. 466 (1985).

Entered this the 3rd day of May, 1988.

WILLIAM J. HAYNES, JR.
William J. Haynes, Jr.
United States Magistrate

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION NO. 3-87-0859

THIRD NATIONAL BANK IN NASHVILLE,
Plaintiff,

v.

WEDGE GROUP INCORPORATED,
Defendant.

ORDER

The Court has considered WEDGE Group, Inc's Objections to Magistrate's Report and Recommendation and Request for *De Novo* Determination Rejecting Magistrate's Recommendation and Findings and finds it meritorious.

It is, therefore, ORDERED that the Report and Recommendation of the Magistrate recommending that WEDGE's Motion to Dismiss be denied is rejected.

Further, ORDERED, that WEDGE's Motion to Dismiss is hereby GRANTED.

Signed this 31st day of May, 1988.

/s/ JOHN T. NIXON
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION NO. 3-87-0859

THIRD NATIONAL BANK IN NASHVILLE,
Plaintiff,

v.

WEDGE GROUP INCORPORATED,
Defendant.

ORDER

The Court is in receipt of Third National Bank's motion to reconsider and request for oral argument. Having already considered the merits of this motion to dismiss, the Court finds that oral argument is unnecessary and thereby DENIES plaintiff's request for such argument.

Having considered plaintiff's motion to reconsider in light of its response to defendant's objections to the Magistrate's Report and Recommendation, the Court remains unpersuaded that defendant Wedge's activities in Tennessee, carried out solely on behalf of its subsidiary, the Rogers Companies, Inc. (TRC), subject Wedge, Inc. to the *in personam* jurisdiction of this Court. The motion to reconsider is therefore DENIED.

Entered this the 3rd day of August, 1988.

/s/ JOHN T. NIXON
United States District Judge

APPENDIX F

NO. 88-5825/6019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THIRD NATIONAL BANK,
in Nashville, Tennessee
Plaintiff-Appellant

v.

WEDGE GROUP, INCORPORATED
Defendant-Appellee

O R D E R

BEFORE: KEITH, KENNEDY and RYAN,
Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellee, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

ENTERED BY ORDER OF
THE COURT

Leonard Green, Clerk

/s/ LEONARD GREEN

APPENDIX G

NO. 88-5825/6019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THIRD NATIONAL BANK,
in Nashville, Tennessee
Plaintiff-Appellant

v.

WEDGE GROUP, INCORPORATED
Defendant-Appellee

O R D E R

BEFORE: KEITH, KENNEDY and RYAN,
Circuit Judges.

Upon consideration of the appellee's motion to stay the mandate

And further considering the appellant's response in opposition,

It is ORDERED that the motion be and it hereby is GRANTED.

ENTERED BY ORDER OF
THE COURT

/s/ LEONARD GREEN, JR.
Leonard Green, Clerk

APPENDIX H

NO. 3-87-0859

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

THIRD NATIONAL BANK IN NASHVILLE,
Plaintiff,

v.

WEDGE GROUP INCORPORATED,
Defendant.

COMPLAINT

For its Complaint against Wedge Group Incorporated ("WEDGE"), the plaintiff Third National Bank in Nashville ("Third National") states as follows:

1. Third National is a banking association formed under the laws of the United States whose principal place of business is, and at material times has been, located in the State of Tennessee. WEDGE is a corporation incorporated under the laws of the State of Delaware whose principal place of business is, and at material times has been, located in a state other than the State of Tennessee. The matter in controversy exceeds, exclusive of interests and costs, the sum of $10,000. Jurisdiction is based upon 28 U.S.C. § 1332, diversity of citizenship.

2. Pursuant to a Loan Agreement originally entered into in May, 1982, and amended in 1983, 1984, 1985, 1986, and 1987 Third National loaned a total of approximately $42,000,000 to The Rodgers Companies, Inc.

("Rodgers") and its subsidiaries. Rodgers and its subsidairies are collectively referred to as TRC. Rodgers was a subsidiary of WEDGE until May 28, 1986. Copies of the Fourth Amendment to Loan Agreement, and the Fifth Amendment to Loan Agreement, which are the current operating documents pertaining to TRC's indebtedness to Third National, are attached as Exhibits A and B, respectively, to this Complaint, and are incorporated by reference. Exhibits A and B and their predecessor instruments are collectively referred to as the Loan Agreement.

3. Pursuant to the Security Agreement between Third National and TRC originally dated May 7, 1982, as amended in 1983, 1984, 1985, 1986 and 1987, most recently by the Fourth Amendment to Loan Agreement and the Fifth Amendment to Loan Agreement, TRC's indebtedness to Third National under the Loan Agreement is secured by, among other things, an assignment of and security interest in TRC's accounts, accounts receivable, contracts, contract rights and rights to payment owed to or due to TRC (collectively the "Accounts"). A copy of the original Security Agreement is attached as Exhibit C and incorporated by reference. Amendments to the Security Agreement are set forth in Article 8 of the Fourth Amendment to Loan Agreement attached as Exhibit A and in the Fifth Amendment to Loan Agreement attached as Exhibit B. (Exhibit C as amended by earlier amendments and by Exhibits A and B is referred to as the Security Agreement.)

4. The Accounts in which Third National has a security interest include TRC's rights under a Tax Sharing Agreement entered into between WEDGE and TRC

effective as of October 1, 1980 (the "Tax Sharing Agreement"). A copy of the Tax Sharing Agreement is attached as Exhibit D and incorporated by reference. TRC and WEDGE were members of an affiliated group of corporations, as defined in Section 1504(a) of the U.S. Internal Revenue Code of 1954, as amended, from October 1, 1980 until June 9, 1986.

5. Third National has accelerated the TRC indebtedness by reason of an Event of Default as defined in the Security Agreement and the Loan Agreement. TRC owes to Third National the sum of $6,150,082.36, plus interest and expenses, including attorneys' fees, incurred by Third National. By reason of its security interest in the Accounts, Third National is entitled to enforce TRC's rights under the Tax Sharing Agreement with WEDGE.

6. WEDGE owes $2,568,983 to TRC, and hence to Third National, under the Tax Sharing Agreement. Third National is also entitled to recover its attorneys' fees from WEDGE pursuant to Tex. Civil Code Ann. § 38.001 (Vernon 1986).

7. All conditions precedent to Third National's right to enforce the Tax Sharing Agreement against WEDGE have been met, and Third National is entitled to judgment against WEDGE in the amount of $2,568,983 plus costs, attorneys' fees, and pre and post-judgment interest.

WHEREFORE, Third National demands judgment aginst WEDGE for the sum of $2,568,983 plus costs, interest and attorneys' fees, together with such other relief to which the court finds it is entitled.

Respectfully submitted,

FARRIS, WARFIELD &
KANADAY

By: /s/ THOMAS P. KANADAY, JR.
Thomas P. Kanaday, Jr.

By: /s/ GARRY K. GROOMS
Garry K. Grooms

Attorneys for Third National
Bank in Nashville
Nineteenth Floor
Third National Financial Center
424 Church Street
Nashville, Tennessee 37219
(615) 244-5200

EXHIBIT A

FOURTH AMENDMENT TO
LOAN AGREEMENT

THIS FOURTH AMENDMENT TO LOAN AGREEMENT (hereinafter referred to as this "Agreement") is made and executed as of the 21st day of February, 1986, by and between THE RODGERS COMPANIES, INC. ("TRC"), P.O. Box 17387, Nashville, Tennessee 37217; RODGERS CONSTRUCTION, INC. OF NASHVILLE, TENNESSEE ("RCI"), P.O. Box 17387, Nashville, Tennessee 37217; TERRA CONSTRUCTION COMPANY ("Terra"), P.O. Box 17387, Nashville, Tennessee 37217; KNC, INC. ("KNC"), P.O. Box 14627, Albuquerque, New Mexico 87191; SCHMIDT-TIAGO CONSTRUCTION COMPANY ("Schmidt-Tiago"), P.O. Box 17387, Nashville, Tennessee 37217; TETON CONSTRUCTION COMPANY ("Teton"), P.O. Box 3243, Cheyenne, Wyoming 82001; TERRA LEASING COMPANY ("TLC"), P.O. Box 26700, Albuquerque, New Mexico 87125; PALISADE CONSTRUCTION COMPANY ("Palisade"), P.O. Box 17387, Nashville, Tennessee 37217; JOHN S. CLARK COMPANY, INC. ("Clark"), 511 East Pine Street, Mount Airy, North Carolina 27030 (hereinafter jointly and severally referred to as "Borrower"), and THIRD NATIONAL BANK IN NASHVILLE, a national banking association with its principal offices located at 201 Fourth Avenue, North, Nashville, Tennessee 37244 (hereinafter referred to as "Lender").

WITNESSETH

WHEREAS, Borrower's Existing Loans matured on January 15, 1986 and are in default; and

WHEREAS, Borrower seeks an additional loan facility from Lender; and

WHEREAS, Lender is willing to extend the maturity dates of the Existing Loans, as set out herein, and advance further limited credit to Borrower under the terms and conditions set out herein; and

WHEREAS, the purpose of this Agreement is to amend and restate that certain Loan Agreement dated as of May 7, 1982, as amended by a First Amendment to Loan Agreement and Loan Documents dated as of January 20, 1983, by a Second Amendment to Loan Agreement and Loan Documents dated as of July 11, 1983 and by a Third Amendment to Loan Agreement and Loan Documents dated as of June 5, 1985, by and among certain of the parties, and all related loan documents (i) to extend and modify the Existing Loans and (ii) to provide for an additional Guaranteed Loan in the amount of up to $10,000,000.

EXHIBIT B

THIS FIFTH AMENDMENT TO
LOAN AGREEMENT

THIS FIFTH AMENDMENT TO LOAN AGREEMENT (hereinafter referred to as "Agreement") is made and entered as of the 16th day of January, 1987 by and between THE RODGERS COMPANIES, INC. ("TRC"), RODGERS CONSTRUCTION, INC. OF NASHVILLE, TENNESSEE ("RCI"), TERRA CONSTRUCTION COMPANY ("Terra"), KNC, INC. ("KNC"), SCHMIDT-TIAGO CONSTRUCTION COMPANY ("Schmidt-Tiago"), TERRA LEASING COMPANY ("TLC"), PALISADES CONSTRUCTION COMPANY ("Palisade"), TCC LIQUIDATION CORP. (f/k/a Teton Construction Company) ("TCC") (hereinafter jointly and severally referred to as "Borrower") and THIRD NATIONAL BANK IN NASHVILLE, a national banking association with its principal offices located at 201 Fourth Avenue North, Nashville, Tennessee 37244 (hereinafter referred to as "Lender") and FEDERAL INSURANCE COMPANY ("Federal").

WITNESSETH:

WHEREAS, the purpose of this Agreement is to amend that certain Fourth Amendment to Loan Agreement dated as of February 21, 1986 ("Loan Agreement");

WHEREFORE, the parties agree as follows:

1. Section 2.01 of the Loan Agreement is amended as follows.

   a. Section 2.01(a) is amended to reflect that the current principal balance of the $20,000,000 Amended Revolving Credit and Term Note dated July 11, 1983 attached hereto as Exhibit A is $6,009,483.23 ("Revolving Credit Note")

   b. Section 2.01(b) is amended to reflect that the current principal balance of the $8,500,000 Amended Working Capital Revolving Credit Note dated July 11, 1983 attached as Exhibit B is $7,500,000. The parties agree that the $500,000 letter of credit, originaly issued November 22, 1985 and extended ("$500,000 L/C") shall be treated as a "separate obligation of Borrower to Lender and shall no longer be considered part of the $8,500,000 Amended Working Capital Revolving Credit Note ("$7,500,-000 Note");

   c. Section 2.01(c) is amended to reflect that the face amount of the Schmidt letter of credit has been reduced to $970,500. This obligation continues to be owed by Borrower to Lender ("Schmidt L/C");

   d. Section 2.01(d) is deleted.

EXHIBIT C

SECURITY AGREEMENT

Debtor:

THE RODGERS COMPANIES, INC
P. O. Box 17387
Nashville, Tennessee 37217

TERRA CONSTRUCTION COMPANY
P. O. Box 17387
Nashville, Tennessee 37217

RODGERS CONSTRUCTION, INC. OF NASHVILLE, TENNESSEE
P. O. Box 17387
Nashville, Tennessee 37217

KNC, INC.
P. O. Box 14627
Albuquerque, New Mexico

SCHMIDT-TIAGO CONSTRUCTION COMPANY
P. O. Box 487
Arvada, Colorado 80001

TETON CONSTRUCTION COMPANY
P. O. Box 2343
Cheyenne, Wyoming 82001

PALISADES CONSTRUCTION COMPANY
P. O. Box 1475
Meeker, Colorado 81641

TERRA LEASING COMPANY
P. O. Box 487
Arvada, Colorado 80001

Secured Party:

THIRD NATIONAL BANK IN NASHVILLE
201 Fourth Avenue, North
Nashville, Tennessee 37244

SECURITY AGREEMENT made this 7th day of May, 1982 between THE RODGERS COMPANIES, INC., a Delaware corporation, P. O. Box 17387, Nashville, Tennessee 37217; TERRA CONSTRUCTION COMPANY, P. O. Box 17387, Nashville, Tennessee 37217; RODGERS CONSTRUCTION, INC. OF NASHVILLE, TENNESSEE, P. O. Box 17387, Nashville, Tennessee 37217; KNC, INC., P. O. Box 14627, Albuquerque, New Mexico; SCHMIDT-TIAGO CONSTRUCTION COMPANY, P. O. Box 487, Arvada, Colorado 80001, TETON CONSTRUCTION COMPANY, P. O. Box 2343, Cheyenne, Wyoming 82001, PALISADES CONSTRUCTION COMPANY, P. O. Box 1475, Meeker, Colorado 81641, TERRA LEASING COMPANY, P. O. Box 487, Arvada, Colorado 80001 (hereinafter jointly, severally, and collectively referred to as "Debtor") and THIRD NATIONAL BANK IN NASHVILLE, a national banking association, having its principal place of business at the address shown above (hereinafter referred to as "Secured Party").

WITNESSETH:

WHEREAS, for and in consideration of the execution of this Security Agreement by Debtor, Secured Party is concurrently herewith entering into a loan agreement dated as of May 7, 1982 ("Loan Agreement") with Debtor pursuant to which Secured Party will be obligated to extend credit to Debtor; and

WHEREAS, Secured Party desires to obtain, and Debtor desires to grant, a security interest in certain property of Debtor, now owned or hereafter acquired, and the proceeds thereof, to secure repayment of all indebtedness described in Section 2 hereof;

NOW, THEREFORE, in consideration of the premises and the mutual promises and covenants hereinafter set forth, the parties hereby agree as follows:

Section 1. Security Interest. As security for the payment of the indebtedness more particularly described in Section 2 of this Security Agreement, Debtor hereby assigns and grants to Secured Party a security interest in and to the following described property (hereinafter sometimes referred to as the "Collateral"):

(a) All of Debtor's existing equipment, machinery parts and accessories and all of Debtor's equipment, machinery parts and accessories which may be acquired during the term of this Agreement;

(b) All proceeds (including insurance proceeds) or products attributable to or arising from any of the foregoing Collateral;

(c) All other property substituted for any of such property described above including the proceeds and products of all such collateral.

Section 2. Indebtedness Secured Hereby. The security interest granted herein by Debtor secures and shall secure:

(a) Payment of an indebtedness evidenced by (i) a $15,000,000.00 Revolving Credit and Term Note of even date herewith, (ii) a $5,000,000.00 Working Capital Revolving Credit Note of even date herewith, and (iii) a Letter of Credit Note in the original principal amount of up to $2,417,420.00, each note being issued by the Debtor (jointly and severally) to Secured Party pursuant to the Loan Agreement, and all extensions, modifications and renewals thereof (collectively, the "Notes");

(b) Payment of all other obligations, liabilities and indebtedness owed by the Debtor to Secured

Party both now existing or hereafter contracted or arising, joint or several, due or to become due, absolute or contingent, direct or indirect, liquidated and unliquidated, and all renewals, extensions or modifications thereof and whether incurred or given as maker, endorser, guarantor, customer, or otherwise;

(c) Payment of all money or property heretofore or in the future advanced to or for the account of, or on behalf of, Debtor;

(d) Payment of all costs and expenses incurred by Secured Party in enforcing or protecting its rights with respect to the Collateral or the indebtedness secured by the Collateral, including, but not limited to, reasonable attorneys fees;

(e) Payment of all future advances made by Secured Party for taxes, levies, insurance and/or repairs to or maintenance of the Collateral.

For purposes of this Security Agreement, all such sums secured by the Collateral shall be referred to as "Indebtedness."

Section 3 Debtor's Representations to Secured Party. Debtor hereby represents the following facts to be true and correct as of the date hereof:

(a) Debtor is the true and lawful owner of the Collateral;

(b) Debtor has a good right to grant a security interest in the Collateral;

(c) Except as disclosed on Exhibit A hereto, there are no advances, liens, security interests or encumbrances against the Collateral except the lien of ad valorem taxes not yet delinquent;

(d) All of Debtor's representations with respect to the Collateral contained in the Loan Agreement are incorporated herein by reference and made a part hereof.

Section 4 Debtor's Warranties and Covenants of Debtor to Secured Party.

Debtor hereby warrants, covenants and agrees that, until the Indebtedness secured hereby shall have been paid in full or unless it shall have received the prior written consent of the Secured Party:

Protection and Use of Collateral. Debtor will keep the Collateral free from any adverse lien, security interest, or encumbrance (other than the security interest granted herein, and the lien of ad valorem taxes not yet delinquent) and in good order and repair and will not waste or destroy the Collateral or any part thereof; Debtor will not use the Collateral in violation of any regulations, statute or ordinance or of any judgments, citations, decrees or orders of any judicial or administrative authority;

Sale or Impairment of Collateral. Debtor will not sell or offer to sell or otherwise transfer, dispose of or encumber the Collateral, or any interest therein, or otherwise dispose of any material asset, for less than its reasonable fair market value in such manner as to materially diminish the value of the Collateral, or in any other manner impair any of its assets so as to substantially diminish the value of the Collateral;

Maintain Insurance. Debtor will maintain insurance, in form, amounts, and with companies in all respects reasonably satisfactory to Secured Party, insuring the Collateral against loss from fire, theft, and any other risks determined by Secured Party. Secured Party shall be designated as an additional

insured under the terms of the policies evidencing such insurance and shall receive a minimum of 30 days written cancellation notice from the company or insurer issuing such policy or policies. If Debtor fails to furnish said insurance or fails to pay the premiums therefor, Secured Party may do so or may obtain insurance of its interest only, adding the amount of any such premium thereof to the other amounts secured hereby; *provided, however,* Secured Party is under no obligation or duty to pay such premiums or- obtain or maintain such insurance. Debtor hereby assigns to Secured Party any return or unearned premiums which may be due upon cancellation of any of said policies for any reason whatsoever, and directs all insurors to pay Secured Party any amount so due, unless the Indebtedness has been previously fully satisfied. In order to collect such return or unearned premiums or the benefits of such insurance, the Secured Party acting through any officer, agent or employee is hereby appointed Debtor's attorney-in-fact to endorse any draft or check which may be payable to Debtor. Any balance of insurance proceeds remaining after payment in full of all amounts owing to Secured Party shall be paid to Debtor. Such return or unearned insurance premium or the benefits of such insurance, may, at Secured Party's option, be used for other insurance or to repair, restore, or replace the Collateral, or may be applied to any Indebtedness secured hereunder, and if the Indebtedness is payable in installments, then to the installments in inverse order, satisfying the final maturing installments first;

Indemnification. Debtor will and does hereby agree to indemnify and hold Secured Party harmless against all claims arising out of or in connection with Debtor's ownership or use of the Collateral;

Removal of Collateral. Debtor will not permit any of the Collateral to be removed from its present loca-

tion, and Debtor will promptly notify Secured Party of any change of Debtor's residence, place of business or in the location of the Collateral within the state where it is presently located, and Debtor will not, without the prior written consent of Secured Party, remove the Collateral to any jurisdiction other than a jurisdiction in which the Secured Party shall have perfected its lien by filing prior to such removal as provided in the Loan Agreement.

Tax Liens, Etc. Debtor agrees to pay all taxes or other liens taking priority over the security interest created in this Security Agreement and should default be made in the payment of same Debtor agrees to give Secured Party prompt notice of such default and Secured Party, at its option, may pay the same, which shall then become part of the Indebtedness secured hereby;

Execute Additional Documents. Debtor will sign and execute alone or with Secured Party any financing statement or other document or procure any document and pay all necessary costs to protect the security interest under this Security Agreement against the interest of third persons. Debtor will pay the cost of filing the same in all public offices wherever filing is deemed by Secured Party to be necessary or desirable. Secured Party is hereby appointed Debtor's attorney-in-fact to do all acts and things which Secured Party may deem necessary to perfect and/or continue the perfection of the security interest created by this Security Agreement and to protect the Collateral. Debtor further agrees to pay all costs and fees for filing any termination statements;

Maintain Present Corporate Name and Form. Debtor shall not change its corporate name or materially amend the Company's Articles of Incorporation or change in any manner the rights of its capital stock or other securities or the primary character of its business;

Section 5. Debtor's Use of Collateral. Prior to the occurrence of an Event of Default (as hereinafter defined) Debtor may use the Collateral in the ordinary course of Debtor's business; provided, upon the occurrence of an Event of Default Debtor's right to so use the Collateral shall terminate until further written notice from the Secured Party.

Section 6 Events of Default. The term "Event of Default", whenever used in this Security Agreement, shall mean any one or more of the following events or conditions:

(a) the occurrence of an Event of Default under the Loan Agreement in its present form and as it may later be amended from time to time;

(b) loss or destruction which is not fully insured, or unauthorized sale, transfer or disposition (without the prior written consent of Secured Party) or unauthorized encumbrance of any of the Collateral.

Section 7. Remedies. Secured Party shall have the following remedies hereunder:

Acceleration and Foreclosure, Etc. Upon the happening of any Event of Default specified in Section 6 above, and at any time thereafter, at the option of the Secured Party, any and all Indebtedness secured hereby shall become immediately due and payable without presentment or demand or any notice to Debtor or any other person obligated thereon and Secured Party shall have and may exercise any or all of the rights and remedies of a secured party under the Uniform Commercial Code as adopted in the State of Tennessee, and as otherwise contractually granted herein or under any other applicable law or under any other agreement executed by Debtor in

favor of Secured Party, including, without limitation, the right and power to sell, at public or private sale or sales, or otherwise dispose of or utilize such portion of the Collateral and any part or parts thereof in any manner authorized or permitted under said Uniform Commercial Code after default by a Debtor, and to apply the proceeds thereof toward payment of any costs and expenses and reasonable attorney's fees and legal expenses thereby incurred by Secured Party and toward payment of the obligations in such order or manner as Secured Party may elect. As an essential part of the bargained-for consideration running to the Secured Party, Debtor hereby expressly grants to Secured Party the contractural right to purchase any or all of the Collateral at private sale any time after 10 days notice of such sale shall have been sent to Debtor by Secured Party, provided, Debtor shall have the right to be present at a private sale at which Secured Party proposes to purchase part or all of the Collateral and may purchase the Collateral by paying $1.00 in excess of the Secured Party's proposed purchase price for the Collateral. This right shall apply only with respect to private sales in which the Secured Party would be the high bidder.

Waiver of Notice, Etc. Debtor agrees that if such notice of default is mailed, postage prepaid, or sent by telegram, charges prepaid, to Debtor at the address stated at the beginning of this document at least 15 days before the time of the proposed sale or disposition, such notice shall be deemed reasonable and shall fully satisfy any requirement of giving of notice, and the proposed sale may take place any time after such 15 day period (but not more than 45 days thereafter) without the necessity of sending another notice to Debtor. Secured Party may postpone and reschedule any proposed sale at its option without the necessity of giving Debtor further notice

of such fact as long as the rescheduled sale occurs within 45 days of the originally scheduled sale.

Method of Sale of Collateral Approved. All recitals in any instrument of assignment or any other document or paper executed by Secured Party incident to sale, transfer, assignment or other disposition or utilization of the Collateral or any part thereof hereunder shall be sufficient to establish full legal propriety of the sale or other action taken by Secured Party or of any fact, condition or thing incident thereto and all prerequisites of such sale or other action shall be presumed conclusively to have been performed or to have occurred.

Preservation of Collateral and Proceeds. In addition to the foregoing provisions, following an Event of Default, and upon Secured Party's demand, Debtor agrees to assemble the Collateral at its usual place of business and make same available to Secured Party immediately.

Section 8. Secured Party's Powers and Duties with Respect to Collateral.

(a) Secured Party shall be under no duty to collect any amount which may be or become due on any of the Collateral now or hereafter pledged hereunder to realize on Collateral, to collect principal, interest or dividends, to keep the same insured, to make any presentments, demands or notices of protest, in connection with any of the Collateral, or to do anything for the enforcement and collection of Collateral or the protection thereof.

(b) Not limiting the generality of any of the foregoing but in amplification of the same, Secured Party shall be in no way liable to or responsible for any diminution in the value of the Collateral from any

cause whatsoever, other than the active misfeasance of Secured Party.

(c) Debtor agrees to pay all taxes, charges, transfer fees and assessments against the Collateral and to do all things necessary to preserve and maintain the value and collectibility thereof, and on the failure of Debtor to so do, Secured Party, may, after giving Debtor written notice of its intention to do so, make such payments and advance such sums on account thereof as Secured Party, in Secured Party's discretion, deems desirable. Debtor agrees to reimburse Secured Party immediately upon demand for all such payments and advances plus interest thereon at the rate of 18% per annum or at such lesser rate as may be the maximum rate allowed by applicable law, repayment of all of which is secured by this Security Agreement and the Collateral.

(d) Secured Party, or any of its agents, shall have the right to call at reasonable times at the Debtor's place or places of business at intervals to be determined by Secured Party, and without hindrance or delay, to inspect, audit, check, and make extracts from the books, records, journals, orders, receipts, correspondence, and other data relating to the Debtor's operations.

Section 9. General Authority. Effective immediately but exercisable by Secured Party only upon the occurrence of an Event of Default, Debtor hereby irrevocably appoints Secured Party as Debtor's true and lawful attorney-in-fact with full power of substitution, in Secured Party's name or Debtor's name or otherwise, for Secured Party's sole use and benefit, but at Debtor's cost and expense, to exercise at any time and from time to time all or any of the following powers with respect to all or any of the Collateral:

(a) to demand, sue for collection, receive and give acquittance for any and all monies due or to become due upon or by virtue thereof;

(b) to receive, take, endorse, assign and deliver any and all checks, notes, drafts, documents and other property taken or received by Secured Party in connection therewith; and

(c) to extend the time of payment and to make any allowance and other adjustments with reference thereto;

Provided, however, the exercise by Secured Party of or failure to so exercise any such authority shall in no manner affect Debtor's liability to Secured Party hereunder or in connection with the Indebtedness; and provided further, that Secured Party shall be under no obligation or duty to exercise any of the powers hereby conferred upon it and it shall have no liability for any act or failure to act in connection with any of the Collateral. Secured Party shall not be bound to take any steps necessary to preserve rights in any instrument, contract or lease against prior parties.

Section 10. Survival of Agreements, Representations and Warranties. All agreements, representations and warranties contained herein or made in writing by or on behalf of Debtor in connection with the transactions contemplated hereby shall survive the execution and delivery of this Security Agreement, any investigation at any time made by Secured Party or on its behalf, and the acquisition and disposition of the Indebtedness. All statements contained in any certificate or other instrument delivered by or on behalf of Debtor pursuant hereto or in connection with the transactions contemplated hereby shall be deemed representations and warranties by Debtor hereunder.

Section 11. Dealings With Debtor. It is expressly understood and agreed that notwithstanding anything

else contained in this Security Agreement, Secured Party may, for all purposes hereof deal solely with Debtor in connection therewith, and nothing herein or in the Loan Agreement shall be construed so as to require dealings with, consent of, or notice to any other parties or persons.

Section 12. Agreement Not Exclusive Remedy. This Agreement shall not prejudice the right of Secured Party, at its option, to enforce collection of the Indebtedness by suit or in any lawful manner. If Secured Party has additional security, then it may resort to such other security for the payment of the Indebtedness secured hereby. No right or remedy in this Security Agreement or in any instrument evidencing the Indebtedness is intended to be exclusive of any other right or remedy, but every such right or remedy shall be cumulative and shall be in addition to every other right or remedy herein or therein conferred, or now or hereafter existing, by contract, at law or in equity or by statute.

Section 13. Non-Waiver Provision. No delay or omission by Secured Party to exercise any right or remedy shall impair such right or remedy or any other right or remedy or shall be construed to be a waiver of any Event of Default or an acquiescence therein; and every right and remedy herein conferred or now or hereafter existing by contract or at law or in equity or by statute may be exercised separately or concurrently and in such order and as often as may be deemed expedient by Secured Party. Not limiting the generality of the foregoing, pursuit or exercise of any right or remedy conferred herein, or by law or in equity or by statute, shall not be, and shall not be considered to be, an election against, waiver or relinquishment of, any other right or remedy.

Section 14. Severability. The invalidity or unenforceability of any of the rights or remedies herein provided in any jurisdiction shall not in any way affect the right

to the enforcement in such jurisdiction or elsewhere of any of the other rights or remedies herein provided.

Section 15. Applicable Law. This Security Agreement is being delivered and is intended to be performed in the State of Tennessee and shall be construed and enforced in accordance with and governed by the substantive law of such State.

Section 16. Binding Agreement. This Security Agreement shall be binding upon and inure to the benefit of the successors, representatives and assigns of the parties hereto.

Section 17. Entire Agreement. This Agreement contains the entire Security Agreement between the Secured Party and the Debtor and supersedes all prior agreements and understandings relating to the subject matter hereof, except as may be contained in the Loan Agreement and the other Loan Documents delivered in connection therewith. It may not be changed or terminated orally, but may only be changed by an agreement in writing signed by the party or parties against whom enforcement of any waiver, change, modification, extension, discharge or termination is sought.

Section 18. Captions. The captions of this Security Agreement are for the purpose of reference only, and shall not limit or otherwise affect any of the terms hereof.

Section 19. Notices. All notices, certificates, requests, consents and other communications hereunder shall be in writing and shall be mailed by first class registered or certified mail, postage prepaid, or sent by telegram, charges prepaid, as follows:

(a) If to Secured Party, to the address as it appears at the beginning of this Security Agreement, to the attention of Stephen S. Mathews, with a copy to Farris, Warfield & Kanaday, 17th Floor, Third National Bank Building, Nashville, Tennessee 37219, Attention: Stephen W. Ramp;

(b) If to the Debtor, to the address as it appears at the beginning of the Security Agreement, with a copy to Dearborn & Ewing, 1200 One Commerce Place, Nashville, Tennessee 37219, Attention: Ben L. Cundiff.

or at such other address as either party may designate by written notice to the other party in accordance herewith.

20. Agent. For the convenience of the parties the Debtor hereby appoints The Rodgers Companies, Inc. as agent for each Debtor to execute in its own name on behalf of itself and each Debtor any and all documents, agreements, amendments or modifications in connection with the Collateral, this Agreement, the Notes and/or the Loan Agreement, and notice to The Rodgers Companies, Inc. shall be notice to each Debtor.

IN WITNESS WHEREOF, this Security Agreement has been executed and delivered as of the date first above written.

DEBTOR:

THE RODGERS COMPANIES, INC.

By: /s/ Signature Illegible
Vice President

TERRA CONSTRUCTION COMPANY

By: /s/ Signature Illegible
Vice President

RODGERS CONSTRUCTION, INC. OF NASHVILLE, TENNESSEE

By: /s/ Signature Illegible
Secretary

SCHMIDT-TIAGO CONSTRUCTION COMPANY

By: /s/ Signature Illegible
Vice President

KNC, INC.

By: /s/ Signature Illegible
Vice President

TETON CONSTRUCTION COMPANY

By: /s/ Signature Illegible
Vice President

PALISADES CONSTRUCTION COMPANY

By /s/ SIGNATURE ILLEGIBLE
Vice President

TERRA LEASING COMPANY

By: /s/ Signature Illegible
Vice President

SECURED PARTY:

THIRD NATIONAL BANK IN NASHVILLE

By: /s/ Signature Illegible
Vice President

EXHIBIT A TO
SECURITY AGREEMENT
EXHIBIT D

TAX SHARING AGREEMENT

THIS AGREEMENT effective as of *October 1, 1980,* between WEDGE Group Incorporated, a Delaware corporation ("WEDGE"), the corporation which has executed this Agreement as Parent Company on the signature page hereof ("Parent"), and the corporation or corporations which have executed this Agreement as Subsidiary Company or Subsidiary Companies on the signature page hereof ("Sub");

W I T N E S S E T H:

WHEREAS, WEDGE, is the common parent corporation of an affiliated group of corporations (as defined in Section 1504(a) of the U. S. Internal Revenue Code of 1954, as amended (the "Code")), which includes, without limitation, (i) WEDGE as the common parent corporation, (ii) Parent, and (iii) Sub; and

WHEREAS, The Consolidated Group (as hereinafter defined) proposes to elect to file consolidated federal income tax returns under Section 1501 of the Code, so that the tax liability of the Consolidated Group will be determined under Section 1502 of the Code and the Regulations thereunder by consolidating the income, expenses, gains, losses and credits of all of the members of the Consolidated Group; and

WHEREAS, WEDGE desires to include Parent and Sub as members of the Consolidated Group; and

WHEREAS, WEDGE, Parent and Sub wish to enter into this Agreement to set forth their understanding as to certain matters pertaining to their federal income tax liabilities;

NOW, THEREFORE, WEDGE, Parent and Sub agree as follows:

1. *Definitions.* For purposes of this Agreement:

(i) "Consolidated Group" means WEDGE and all corporations which WEDGE may now or from time to time hereafter be eligible or required to include in a consolidated federal income tax return with WEDGE as the common parent corporation. At the date hereof, such term includes, without limitation, WEDGE, Parent and Sub.

(ii) "Consolidated Group Return" means with respect to any Consolidated Return Year, the federal income tax return of the Consolidated Group for such Consolidated Return Year.

(iii) "Consolidated Return Date" means each date upon which the Consolidated group shall file its federal income tax return.

(iv) "Consolidated Return Year" means any taxable year or period during which WEDGE owns outstanding stock of Parent in such amounts and having such characteristics as shall meet the requirements of Section 1504(a)(1) of the Code.

(v) "Parent Consolidated Group" means Parent and all corporations which Parent would from time to time be eligible or required to include in a consolidated federal income tax return with Parent as the common parent cor-

poration, determined as if Parent had no parent corporation and was not includible in any chain of corporations connected through stock ownership with a common parent corporation (other than Parent). At the date hereof, such term includes Parent and Sub.

(vi) "Estimated Payment Date" means any date during any Consolidated Return Year upon which the Consolidated Group is required to make a payment of estimated tax, whether or not such a payment is due, for such Consolidated Return Year.

(vii) "Extension Payment Date" means with respect to any Consolidated Return Year, any date upon which the Consolidated Group shall be required to make a payment of federal income taxes in connection with any request by WEDGE on behalf of the Consolidated Group for an extension of the date upon which it would have been required, absent such an extension, to file its federal income tax return for such Consolidated Return Year.

(viii) "Group Refund Claim" means any claim filed by WEDGE on behalf of the Consolidated Group for a refund of federal income taxes.

(ix) "Hypothetical Parent Group Return" means with respect to any Consolidated Return Year, a hypothetical federal income tax return for the Parent Consolidated Group prepared by Parent on the assumptions that (i) the Parent Consolidated Group has filed a separate consolidated federal income tax return for all prior Consolidated Return Years, (ii) that the Parent Consolidated Group had been component members of a controlled group of corporations as defined in Section 1563 of

the Code for all such prior years, (iii) the net operating losses described in paragraph 4(d) shall not be included, and (iv) in each instance where the Code provides for limitations on multiple tax benefits, rates, credits, exemption "and other tax attributes" requiring allocation thereof to the various members of a controlled group of corporations, that all such items shall be allocable entirely to WEDGE, unless allocated otherwise by WEDGE.

(x) "IRS" means the United States Internal Revenue Service.

(xi) "Regulations" mean the regulations issued by the Secretary of the Treasury interpreting the Code.

2. *Consent to File Consolidated Returns.* WEDGE, parent and Sub hereby consent to the filing of consolidated federal income tax returns by the Consolidated Group for each Consolidated Return Year, commencing with the year ending September 30, 1981 and for each Consolidated Return Year thereafter, and to any applications for extensions of time to file such returns which WEDGE in its sole judgment shall make to the IRS. Parent and Sub agree to furnish all information and to execute all elections and other documents which may be necessary or appropriate to evidence such consent or to prepare and file such returns and such applications for extension of time to file such returns. In the event that consent is given by the IRS to revoke the election to file a consolidated federal income tax return by the Consolidated Group, WEDGE, Parent and Sub hereby agree to continue to file a consolidated federal income tax return unless WEDGE notifies Parent and Sub to the contrary.

3. *Estimated Payments of Tax Sharing Liability*. At least 30 days prior to each Estimated Payment Date of each Consolidated Return Year, WEDGE shall designate to Parent in writing the method (specified in Section 6655 of the Code) to be used by Parent in making estimated tax computations for such Consolidated Return Year. At least ten days prior to each Estimated Payment Date of each Consolidated Return Year, Parent shall deliver to WEDGE a hypothetical computation of estimated tax for the Parent Consoliated Group reflecting the amount, if any, of the estimated payment of federal income taxes for such Consolidated Return Year which the Parent Consolidated Group would have been required to pay on such estimated Payment Date if it were not included in the Consolidated Group (utilizing, however, the method specified by WEDGE pursuant to the first sentence of this Section 3). Such hypothetical computation shall be certified by an officer of Parent. Parent shall pay to WEDGE, on or before such Estimated Payment Date, the amount reflected as owing in such hypothetical computation. If WEDGE shall request an extension of time to file the Consolidated Group Return for any Consolidated Return Year, then at least ten days prior to the applicable Extension Payment Date, Parent shall compute the hypothetical amount of the federal income tax payment which would have been payable by the Parent Consolidated Group on such Extension Payment Date had the Parent Consolidated Group requested such an extension and had the Parent Consolidated Group not been included in the Consolidated Group during such Consolidated Return Year (utilizing, however, the method specified by WEDGE pursuant to the first sentence of this Section 3). Such computation shall be certified by

an officer of Parent. Parent shall pay to WEDGE, on or before such Extension Payment Date, the amount thus computed by Parent.

4. *Determination of Actual Tax Sharing Liability.* At least 30 days prior to each Consolidated Return Date, Parent shall deliver to WEDGE a Hypothetical Parent Group Return for the Consolidated Return Year for which the Consolidated Group Return is due on such Consolidated Return Date, certified by an officer of Parent. The determination of the amount of federal income tax liability of the Consolidated Group to be paid by Parent to WEDGE shall be made as follows:

(a) If such Hypothetical Parent Group Return reflects a hypothetical federal income tax liability of the Parent Consolidated Group for such Consolidated Return Year, and if the amount of such hypothetical federal income tax liability exceeds the aggregate of all amounts paid to WEDGE by Parent pursuant to Section 3 hereof in respect of such Consolidated Return Year, then Parent shall pay to WEDGE, on or before such Consolidated Return Date, the amount of such excess.

(b) If such Hypothetical Parent Group Return reflects a hypothetical federal income tax liability of the Parent Consolidated Group for such Consolidated Return Year, and if the aggregate of all amounts paid to WEDGE by Parent pursuant to Section 3 hereof in respect of such Consolidated Return Year exceeds the amount of such hypothetical federal income tax liability, then WEDGE shall pay to Parent within 90 days after such Consolidated Return Date, the amount of such excess.

(c) If such Hypothetical Parent Group Return reflects no hypothetical federal income tax liability of the Parent

Consolidated Group for such Consolidated Return Year, and if Parent has made any payments to WEDGE pursuant to Section 3 hereof in respect of such Consolidated Return Year, then WEDGE shall pay to Parent within 90 days after such Consolidated Return Date, an amount equal to all such payments previously made to WEDGE by Parent pursuant to Section 3 hereof.

(d) If such Hypothetical Parent Group return reflects a net operating loss and covers either the first or second Consolidated Return Year during which Parent is a member of the Consolidated Group, then WEDGE shall pay to Parent on such Consolidated Return Date, an amount equal to the maximum rate applicable to that Consolidated Return Year presented in Section 11, in Part II, Subchapter A, Chapter 1 of the Code times the amount of the net operating loss reflected on such Hypothetical Parent Group Return (ignoring any net operating loss carryovers to such Consolidated Return Year) which WEDGE in its sole judgment determines can be utilized in the Consolidated Group Return for such Consolidated Return Year or for a prior Consolidated Return Year. Such payment by WEDGE shall be in the form of a promissory note executed by WEDGE to the order of Parent, payable without interest on demand on or after the penultimate day of the Consolidated Return Year during which such promissory note is executed. From and after the date when such promissory note shall have been paid in full, the net operating loss giving rise to the payment from WEDGE to the Parent shall not be used again by the Parent for any purpose under this Agreement.

5. *Prior Years' Refunds.* At least ten days prior to each Consolidated Return Date, Parent shall deliver to

WEDGE a computation reflecting the amount of any hypothetical refunds of federal income taxes which the Parent Consolidated Group would be entitled to receive in respect of all Consolidated Return Years ended prior to the Consolidated Return Year for which the Consolidated Group Return is being filed on such Consolidated Return Date as if the Parent Consolidated Group were not included in the Consolidated Group during such Consolidated Return Year and all prior Consolidated Return Years. Such computation shall be prepared in the same manner as described in paragraph 1(ix). If such computation reflects any hypothetical refunds owed to Parent then WEDGE shall pay to Parent, on such Consolidated Return Date, an amount equal to the amount of such hypothetical refunds; provided, however, that WEDGE, at its option, may defer payment of such amounts until such time as the IRS or the courts shall have made a final determination of the related Group Refund Claim, if any, filed by WEDGE.

6. *Adjustments after Deconsolidation.* If the Parent Consolidated Group shall cease to be included in the Consolidated Group and thereafter shall earn a tax attribute which is carried back to a Consolidated Return Year, WEDGE and Parent shall furnish to each other any and all data relating to that tax attribute which may be necessary or helpful in connection with the preparation by WEDGE of a Group Refund Claim with respect to such tax attribute or of an Application for a Tentative Carryback Adjustment (which Parent shall sign). WEDGE shall file such Group Refund Claim with the IRS on or before the expiration of the statute of limitations with respect thereto. Upon the receipt by WEDGE of any refund relating to such refund claim, WEDGE shall pay to Parent

the lesser of (i) the reduction of the Consolidated Group tax liability as a result of the tax attribute originating with the Parent Consolidated Group or (ii) the amount of refund the Parent Consolidated Group would have received if it had filed separate consolidated tax returns for all Consolidated Return Years (based upon the law and facts as finally determined in connection with such Group Refund Claim).

7. *Payment of Consolidated Group Tax and Tax Sharing Liabilities.* All payments of actual or estimated federal income taxes owed by the Consolidated Group shall be paid to the IRS by WEDGE, and WEDGE shall be entitled to receive any refunds of federal income taxes owed to the Consolidated Group. WEDGE shall indemnify and hold harmless the Parent Consolidated Group and each member thereof from and against any claims by the IRS in connection with the federal income tax liability of the Parent Consolidated Group (or any member thereof) for a particular Consolidated Return Year except to the extent any such claim by the IRS shall be based upon or arise out of any failure of the Parent Consolidated Group to compute accurately and timely and to pay timely to WEDGE all amounts owed to WEDGE under this Agreement in respect of such Consolidated Return Year. Parent shall be entitled to receive all amounts which may become owing to the Parent Consolidated Group pursuant to this Agreement, and each member of the Parent Consolidated Group shall be jointly and severally liable for the payment of all amounts which may become owing to WEDGE by Parent pursuant to this Agreement.

8. *Earnings and Profits.* The Consolidated Group shall elect to allocate the tax liability of the Consolidated Group among its members in accordance with the method

prescribed in Section 1552(a)(1) of the Code and Paragraph (a)(1) of section 1.1552-1 of the Regulations, with the further elective modifications permitted by Section 1.1502-33(d)(2)(ii) of the Regulations.

9. *Disputes with the IRS and Group Refund Claims.* In the event of a dispute with the IRS concerning the amount of any federal income tax liability of or refund due the Consolidated Group and in connection with every Group Refund Claim, each member of the Parent Consolidated Group hereby expressly confirms the authority granted to WEDGE in Section 1.1502-77 (and in any successor provision thereto) of the Regulations to act on its behalf and authorizes WEDGE and its representatives to pursue such dispute or Group Refund Claim either administratively or by court action. Each member agrees to cooperate by furnishing to WEDGE all records and documents and by making available personnel for testimony which may be necessary or helpful in connection with the negotiation or settlement of such dispute or Group Refund Claim. WEDGE shall have the exclusive right to make any and all decisions to pursue, settle, or appeal any Group Refund Claim or dispute with the IRS and to control all administrative and court proceedings, and the control of all negotiations and settlements shall rest exclusively with WEDGE. If any adjustments are made to the reported income or tax liability of any member of the Parent Consolidated Group in connection with such dispute or Group Refund Claim, WEDGE shall prepare a revised Hypothetical Parent Group, facts as determined by the IRS or the courts in connection with such adjustments, and Parent shall pay to WEDGE within 30 days after the receipt of such Revised Parent Group Return the amount of additional tax liability reflected there-

by, or, alternatively, WEDGE shall pay to Parent within 30 days after the completion of such Revised Parent Group Return any refund reflected thereby. If further litigation occurs after the payment of such additional tax liability, or refund, as the case may be, and the resolution thereof results in any additional tax liability or refund of amounts previously paid, appropriate adjustment shall be made between WEDGE and Parent.

10. *Disagreements.* In the event that WEDGE shall disagree with the computations prepared by Parent pursuant to this Agreement or Parent shall disagree with the Computations prepared by WEDGE pursuant to this Agreement, and WEDGE and Parent are unable to settle their disagreement, the differing computations shall be referred to the certified public accounting firm retained by WEDGE at the time of such referral to prepare the consolidated federal income tax return by the Consolidated Group, whose decision shall be final.

11. *Interest and Penalties.* In connection with any amounts due and payable under this Agreement, interest and penalties shall be calculated at the same rates and upon the same principles as are applied by the IRS to the Consolidated Group tax liability or the Consolidated Group refund in question.

12. *Priority of Agreement.* As between the parties, the provisions of this Agreement shall fix the liability of WEDGE, on the one hand, and the Parent Consolidated Group, on the other hand, to each other as to the matters provided for herein even if payments made pursuant hereto are treated otherwise for federal income tax purposes.

13. *Other Group Members.* WEDGE, Parent and Sub recognize that other corporations are now or may from time to time hereafter become members of the Consolidated Group under circumstances which may warrant other methods of sharing. WEDGE is authorized to enter into the same, similar or different tax sharing agreements with any corporation which is now or may hereafter become a member of the Consolidated Group; provided however, that no different tax sharing agreement with any such other corporation shall adversly affect the rights or obligations of the Parent or Sub hereunder. Notwithstanding the foregoing, if Parent or Sub becomes the owner of outstanding stock of another corporation in such amounts and having such characteristics as shall meet the requirements of Section 1504(a)(1) of the Code, then Parent or Sub as the case may be, shall cause such corporation to adopt and become bound by this Agreement as a member of the Parent Consolidated Group.

14. *Duration.* This Agreement shall remain in effect for each Consolidated Return Year; provided, however that WEDGE and the Parent Consolidated Group shall be entitled to receive and be obligated to pay any amounts subsequently determined to be owing to or by them hereunder, as the case may be, with respect to those years or parts thereof.

15. *Information and Expenses.* Parent agrees to bear all costs incurred by Parent in furnishing records, documents or information in the form requested by WEDGE in connection with the preparation of the Consolidated Group Return and any other returns provided for herein. WEDGE shall be authorized to retain accountants and attorneys for the purpose of correcting such information

provided or obtaining any additional information deemed necessary by WEDGE for the preparation of such returns and Parent agrees to pay the costs reasonably allocated to it by WEDGE of employing such accountants and attorneys. Each member of the Parent Consolidated group shall promptly provide WEDGE with such records, documents and information as WEDGE shall request in connection with the preparation of such returns. WEDGE shall be authorized to retain accountants and attorneys for the purposes of preparing any of the refund claims provided for herein of representation in connection with disputes with the IRS. Parent agrees to pay the costs reasonably allocated to it by WEDGE of employing such attorneys and accounts (including associated court costs) and to bear the costs incurred by it in furnishing records, documents and testimony in connection with any matter described in Section 9 hereof. No such costs incurred by WEDGE will be allocated to Parent when the items giving rise to the refund claim or dispute with the IRS are not attributable to Parent or Sub.

16. *Controlling Law.* This agreement is made under the laws of the State of Texas.

17. *Binding Effect.* This Agreement shall be binding upon, enforceable by and against and inure to the benefit of the parties hereto and the respective successors and assigns of the parties hereto; but no assignment hereof shall relieve any party of its obligations hereunder without written consent of the other parties.

WEDGE:

WEDGE GROUP INCORPORATED

By: /s/ JAMES H. KAUFFMAN,
James H. Kauffman
President

PARENT COMPANY:

The Rodgers Companies, Inc.
a Delaware Company

By: /s/ JOHN D. GRIFFIN
John D. Griffin
Exec. Vice Pres.

SUBSIDIARY COMPANIES:

Terra Construction Company,
a Delaware Company

By: /s/ ROY A. SOMMERS
Roy A. Sommers
Vice Pres.

Schmidt-Tiago Construction Co.,
a Colorado Company

By: /s/ ROY A. SOMMERS
Roy A. Sommers
Vice Pres.

Teton Construction Company,
a Wyoming Company

By: /s/ ROY A. SOMMERS
Roy A. Sommers
Vice Pres.

Rodgers Construction, Inc.,
a Tennessee Company

By: /s/ DONNIE R. FOUTCH
Donnie R. Foutch
Sec.-Treas.

Rodgers Properties, Inc.,
a Tennessee Company

By: /s/ JOHN D. GRIFFIN
John D. Griffin
President

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CIVIL ACTION NO. 3-87-0859

THIRD NATIONAL BANK IN NASHVILLE,
Plaintiff,

v.

WEDGE GROUP INCORPORATED,
Defendant.

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF HARRIS §

My name is C. Don Williams. I am of majority age, am competent, and have never been convicted of a felony or other crime involving moral turpitude.

I am Vice President of WEDGE Group, Inc. ("WEDGE").

I was a Director of The Rodgers Companies, Inc. ("Rodgers") at various times from 1978 until 1986.

Rodgers was a subsidiary of WEDGE from 1978 until 1986.

To the best of my knowledge, none of the officers or directors of WEDGE were at any time an officer of Rodgers.

WEDGE has never held title to property in Tennessee. Nor has WEDGE directly maintained offices, a mailing address or phone listings, or directly retained employees in Tennessee.

A WEDGE owned company, Paragon Industries Corporation, a Delaware corporation, had a manufacturing facility located in Tennessee through its subsidiary, Gilson Brothers Company. However, like Rodgers, Paragon and Gilson are completely autonomous from WEDGE in their day-to-day operations.

At all material times, Rodgers operated autonomously of its parent, WEDGE, as well as its sister corporations. Rodgers had sole responsibility for all of its relations with customers, suppliers, legal counsel, banks and public accountants.

At all material times, the business and financial affairs of Rodgers and WEDGE were carried out in strict observance of all corporate formalities, maintaining the integrity of each as a separate and distinct corporate entity. WEDGE and Rodgers maintained separate bank accounts, accounting and payroll systems, budgets, and financial records. Day-to-day business and operational decisions for Rodgers were made strictly by officers of Rodgers.

/s/ C. DON WILLIAMS
C. Don Williams

SWORN AND SUBSCRIBED before me, this the 8th day of December, 1987.

/s/ Signature Illegible
Notary Public, State of Texas

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-87-0859
JUDGE NIXON

THIRD NATIONAL BANK IN NASHVILLE,
Plaintiff,

v.

WEDGE GROUP INCORPORATED,
Defendant.

AFFIDAVIT OF JAMES P. BENNETT

STATE OF TENNESSEE §
§
COUNTY OF DAVIDSON §

Being first duly sworn, James P. Bennett states as follows:

1. I am Chairman of the Board and President of T.R. Holdings, Inc., a Delaware corpartion and a successor by name change to The Rodgers Companies, Inc. ("TRC").

2. At all times relevant to this case until June of 1986 TRC was a subsidiary of WEDGE, and Rodgers Construction, Inc., of Nashville, Tennessee ("RCI"), a Tennessee Corporation, was a wholly owned subsidiary of TRC.

3. The principal places of business of TRC and RCI were located in Nashville, Tennessee. RCI operated a

construction business in Tennessee and in various other states. TRC also had several other subsidiaries, which operated construction companies and activities in other states. The management activities of TRC and RCI were centered in Nashville, Tennessee.

4. Beginning in May, 1982, Third National Bank in Nashville, Tennessee ("Third National") made loans to TRC and several of TRC's subsidiaries.

5. As security for the loans, among other things, TRC granted to Third National security interests in all its accounts receivable and other rights to payment. One of those accounts receivable is represented by a tax sharing agreement dated October 1, 1980, executed by WEDGE, TRC, and TRC's subsidiaries (the "Tax Sharing Agreement"). A true and correct copy of the Tax Sharing Agreement is attached as Exhibit D to the Complaint.

6. TRC and TRC's subsidiaries defaulted on their obligations in connection with the Third National loans in 1986.

7. Representatives of WEDGE and its related companies have been active in the management of RCI and TRC both as directors and officers of WEDGE. For example, James Kaufman, Dan Feehan, and Don Williams, at various times between 1980 and 1986, acted as directors of both WEDGE and RCI or TRC.

8. During the time from 1980 to 1984, approximately, WEDGE officers met monthly in Nashville, Tennessee, with TRC and RCI management personnel, to review, discuss, and direct the operations and financial activities of TRC, RCI and their respective subsidiaries. Mr.

Feehan, a vice president of WEDGE and Mr. Kaufman, president of WEDGE, were regularly present in Nashville for these meetings.

9. Beginning in late 1984 or early 1985, these meetings were held less often, but WEDGE senior management and other personnel were present in Nashville three to four times per year to discuss the ongoing operations of TRC and RCI and their subsidiaries. Dick Blohm, then president of WEDGE, and Don Williams, his immediate subordinate, were regularly present in Nashville at these meetings.

10. The Tax Sharing Agreement that is the subject of this suit was executed by WEDGE and by TRC and its subsidiaries in 1980. The parties did not negotiate the terms. WEDGE, as TRC's parent and controlling shareholder, simply told TRC to sign.

11. When TRC's ownership was restructured in Nashville, Tennessee in June of 1986, TRC and its subsidiaries ceased to be members of the consolidated group for which WEDGE paid consolidated tax returns.

12. Since 1980, personnel at the offices of TRC and RCI in Nashville have prepared hypothetical tax returns and other financial reporting in compliance with the Tax Sharing Agreement.

13. During periods in late 1985 and early 1986, Don Williams and Dick Blohm, on behalf of WEDGE, spent extended periods of time in Nashville, Tennessee, reviewing the receivables and payables held by TRC and RCI and setting up a cash reporting system.

14. In early 1986, TRC and its subsidiaries began having serious financial problems. In the course of work-

ing out these problems with Third National, TRC management began negotiations with WEDGE for the purchase of the stock of TRC held by WEDGE and/or WEDGE-related entities. It was anticipated that TRC management personnel, including myself, would form a corporation to act as purchaser. WEDGE sent representatives to Nashville to review TRC's financial position, for the purposes of determining whether the stock should be sold and setting a purchase price.

15. I entered into a letter agreement with WEDGE and others regarding the sale of the stock, in February, 1986. The letter agreement provided for WEDGE's sale of its common stock to a corporation of which I would be controlling shareholder ("Buyer"), the exchange of WEDGE's preferred stock in TRC, and essentially for the transfer of control over TRC.

16. In reliance on this letter agreement, which was telecopied to Nashville, Third National agreed to restructure its credit arrangements with TRC, RCI and their respective subsidiaries.

17. After the signing of the letter agreement, negotiations continued regarding the final form of the stock purchase agreement to be entered into between the Buyer and WEDGE. Mr. William Heiligbrodt was WEDGE's key representative in these negotiations and I was the main representative of the Buyer.

18. In connection with the negotiations regarding the stock purchase agreement, in March of 1986, WEDGE raised issues regarding the treatment of the amounts owed to TRC and its subsidiaries by WEDGE under the Tax Sharing Agreement (the "Tax Receiv-

able"). Although the Tax Receivable had not been addressed specifically in the earlier letter agreement, WEDGE wanted to provide in the stock purchase agreement that WEDGE would have no obligations to pay any amounts in connection with the Tax Receivable after the stock purchase was completed.

19. Mr. Heiligbrodt and his lawyers had several discussions with me, along with discussion with Third National and its lawyers, representatives of the Buyer, TRC and RCI, and their various attorneys, regarding the treatment of the Tax Receivable. In fact, the status of the Tax Receivable became a pivotal point in negotiations surrounding the sale of the TRC stock. In order to allow the stock purchase to proceed, Third National agreed to WEDGE's request to temporarily forbear from attempting to collect the Tax Receivable from WEDGE, subject to certain conditions. WEDGE, Third National, and TRC then entered into an agreement (the "Tax Receivable Agreement") regarding each party's rights under the Tax Sharing Agreement. The Tax Receivable Agreement provided that Third National and TRC would forbear from attempting to collect any amounts on the Tax Receivable until certain conditions were met, but acknowledged that Third National could, under certain other conditions, bring suit against WEDGE to recover the Tax Receivable. The Tax Receivable Agreement recites that it was executed in Nashville, Tennessee.

20. For the closing of the stock purchase agreement, WEDGE's attorneys from Houston delivered certain executed documents to attorneys for TRC and the Buyer in Nashville, Tennessee, a few days after Mr. Heiligbrodt's visit to Nashville. One of the documents delivered in

the course of this closing was the Tax Receivable Agreement executed by Mr. Heiligbrodt on behalf of WEDGE.

21. In addition, the stock purchase agreement, as signed in June of 1986, specifically provided that the Tax Sharing Agreement remains in effect and that TRC was no longer a member of the consolidated group.

Further, the Affiant saith not.

/s/ JAMES P. BENNETT
James P. Bennett

Sworn to and subscribed before me, this the 23rd day of December, 1987.

/s/ HILDA S. LEE
Notary Public

My Commission Expires: July 9, 1989

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-87-0859
JUDGE NIXON

THIRD NATIONAL BANK IN NASHVILLE,
Plaintiff,

v.

WEDGE GROUP INCORPORATED,
Defendant.

AFFIDAVIT OF GERALD H. JOHNSON

STATE OF TENNESSEE §
§
COUNTY OF DAVIDSON §

Gerald H. Johnson, being first duly sworn, states as follows:

1. At all times relevant to this lawsuit, I was a Vice-President of The Rodgers Companies, Inc. ("TRC"). this affidavit is based upon my personal knowledge.

2. At all times relevant to this case until June of 1986 TRC was a subsidiary of WEDGE, and Rodgers Construction, Inc., of Nashville, Tennessee ("RCI"), a Tennessee corporation, was a wholly owned subsidiary of TRC.

3. The principal places of business of TRC and RCI were located in Nashville, Tennessee. RCI operated a con-

struction business in Tennessee and in various other states. TRC also had several other subsidiaries, which operated construction companies and activities in other states.

4. Beginning in May, 1982, TRC and several of TRC's subsidiaries received loans from Third National Bank in Nashville ("Third National").

5. TRC and TRC's subsidiaries defaulted on their obligations in connection with the Third National loans in 1986.

6. Representatives of WEDGE have been involved in the relationship between TRC, RCI and Third National. During periods in late 1985 and early 1986, Don Williams, on behalf of WEDGE, spent extended periods of time in Nashville, Tennessee, reviewing the receivables and payables held by TRC and RCI and setting up a cash reporting system.

7. In early 1986, TRC and RCI and their subsidiaries began having serious financial problems. In the course of working out these problems with Third National, TRC management began negotiations with WEDGE for the purchase of the stock of TRC held by WEDGE and/or WEDGE related entities.

8. James Bennett and other TRC management personnel planned to form a corporation to act as purchaser (the "Buyer"). WEDGE sent representatives to Nashville to review TRC's financial position, for the purpose of determining whether the stock should be sold and setting a purchase price.

9. A letter agreement regarding the sale of the stock was entered into by WEDGE and James Bennett, among others, in February, 1986. The letter agreement provided

for WEDGE's sale of its common stock, the exchange of its preferred stock and essentially for transfer of control over TRC.

10. After the signing of the letter agreement, negotiations continued regarding the final form of the stock purchase agreement to be entered into between the Buyer and WEDGE. Mr. William Heiligbrodt was WEDGE's key representative in these negotiations and James Bennett was the main representative of the Buyer. Mr. Heiligbrodt visited Nashville for a meeting at the offices of Dearborn & Ewing, attorneys for the Buyer and Mr. Bennett, regarding the proposed stock purchase agreement. This meeting held in late May or early June of 1986, essentially amounted to a "pre-closing" of the stock purchase agreement, eventually executed on June 4, 1986.

11. During the negotiations regarding the stock purchase agreement, in March of 1986, WEDGE raised issues regarding the treatment of the amounts owed to TRC and its subsidiaries by WEDGE under the Tax Sharing Agreement that is the subject of this suit (the "Tax Receivable"). The Tax Sharing Agreement at issue in this case is based on the relationship among WEDGE, TRC, RCI and their subsidiaries, all of which form a consolidated group for federal income tax purposes.

12. Mr. Heiligbrodt visited Nashville to finalize the details of the Tax Receivable Agreement and the stock purchase agreement in late May, 1986.

Further, the Affiant saith not.

/s/ GERALD H. JOHNSON
Gerald H. Johnson

Sworn to and subscribed before me, this
the 23rd day of December, 1987.

/s/ THERESA J. LAW
Notary Public

(Theresa J. Law now Theresa L. Webb)

My Commission Expires: 1-7-91.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-87-0859
JUDGE NIXON

THIRD NATIONAL BANK IN NASHVILLE,
Plaintiff,

v.

WEDGE GROUP INCORPORATED,
Defendant.

AFFIDAVIT OF MICHAEL J. KANE

STATE OF TENNESSEE §
COUNTY OF DAVIDSON §

Michael J. Kane, being first duly sworn, states as follows:

1. At all times relevant to this lawsuit, I was Vice President of Third National Bank in Nashville ("Third National"), a banking association with headquarters located in Nashville, Tennessee. This affidavit is based on my personal knowledge.

2. Beginning in May, 1982, Third National made loans to The Rodgers Companies, Inc. ("TRC"), a Delaware corporation with its headquarters located in Nashville, Tennessee and several of TRC's subsidiaries.

3. As security for the loans, among other things, TRC granted to Third National security interests in all its

accounts receivable and other rights to payment. One of these accounts receivable is represented by a tax sharing agreement dated October 1, 1980, executed by WEDGE, and by TRC and its subsidiaries (the "Tax Sharing Agreement"). A true and correct copy of the Tax Sharing Agreement is attached as Exhibit D to the Complaint. The Tax Sharing Agreement provides for WEDGE's filing of tax returns for the consolidated group including WEDGE, TRC aund TRC's subsidiaries.

4. TRC and TRC's subsidiaries defaulted on their obligations in connection with the Third National loans in 1986.

5. In April and May of 1985, WEDGE representatives and TRC representatives requested that Third National continue to extend credit to TRC and its subsidiaries, in spite of the worsening financial position of these companies. Dick Blohm, executive vice president of WEDGE and William Heiligbrodt, president of WEDGE, entered into negotiations with Third National. These negotiations resulted in the execution of a third amendment to the loan agreement, dated as of June 5, 1985, executed by Third National and by TRC and its subsidiaries (the "Third Amendment").

6. To induce Third National to enter into the Third Amendment, WEDGE agreed to contribute and did contribute $7,500,000 in cash to TRC, in exchange for TRC stock, to be treated as capital on TRC's books. WEDGE established a new checking account at Third National, in Nashville, to be used in the ordinary course of business of TRC and its subsidiaries, and to act as additional collateral for Third National's loans. Certain officers of WEDGE, including Don Williams, were the

only persons authorized to direct disbursements from the account.

7. WEDGE representatives repeatedly assured Third National that WEDGE supported TRC and that Mr. Heiligbrodt and Mr. Blohm would be actively involved in TRC and work closely with Mr. Bennett.

8. WEDGE's position in the management of TRC was so important to Third National that the Third Amendment specifically provided that any material change in WEDGE's direct or indirect control of TRC would constitute an event of default under the loan agreement.

9. In early 1986, TRC and its subsidiaries began having serious financial problems. In the course of working out these problems with Third National, TRC management began negotiations with WEDGE for the purchase of the stock of TRC held by WEDGE and/or RIBV.

10. Eventually, a letter agreement regarding the sale of the stock was entered into by WEDGE and James Bennett, among others, in February, 1986. In reliance on this letter agreement, which was telecopied to Nashville, Third National agreed to restructure its credit arrangements with TRC, RCI and their respective subsidiaries.

11. WEDGE's liability under the Tax Sharing Agreement was not addressed specifically in the letter agreement. Nevertheless, WEDGE wanted to provide in the stock purchase agreement that WEDGE would have no obligations to pay any amounts in connection with the Tax Receivable after the stock purchase was com-

pleted. Mr. Heiligbrodt called me in Nashville to discuss the Tax Receivable.

12. Eventually, in order to allow the stock purchase to proceed, Third National agreed to WEDGE's request to forbear temporarily from attempting to collect the Tax Receivable from WEDGE, subject to certain conditions. WEDGE, Third National, and TRC then entered into an agreement (the "Tax Receivable Agreement") regarding each party's rights under the Tax Sharing Agreement. A true and correct copy of the Tax Receivable Agreement is attached as Exhibit A hereto.

Further, the Affiant saith not.

/s/ MICHAEL J. KANE
Michael J. Kane

Sworn to and subscribed before me, this the 23rd day of December, 1987.

/s/ CELIA E. BOWIE
Notary Public

My Commission Expires: 5/13/90

EXHIBIT A

AGREEMENT RELATIVE TO
ACCOUNTS RECEIVABLE

Third National Bank in Nashville ("Bank") and WEDGE GROUP INCORPORATED ("Wedge") have entered into this agreement as of the 4th day of June, 1986.

RECITALS

Wedge is a Delaware corporation.

The Rodgers Companies, Inc. ("TRC") is a Delaware corporation.

TRC owns 100% of Terra Construction Company, Schmidt-Tiago Construction Co., Teton Construction Company, Rodgers Construction Inc. of Nashville, Tennessee, Rodgers Properties, Inc., KNC, Inc., and John S. Clark Construction Co., Inc. ("Subsidiaries").

Wedge and TRC entered into a Tax Sharing Agreement dated October 1, 1980 ("Tax Agreement") which is incorporated herein by reference.

On December 9, 1983, Wedge and TRC entered into a Letter Agreement regarding TRC's payment to Wedge of $862,265 designated by Wedge and TRC as a prepayment of TRC's deferred federal income tax liability ("Letter Agreement").

As of December 31, 1984, TRC's financial statements reflected a tax receivable due from Wedge of $3,431,248.00 based upon the Tax Agreement and the Letter Agreement. This amount and any other amounts which

may be owed by Wedge to TRC and or the Subsidiaries are hereinafter referred to as the "Accounts".

Wedge denies liability in respect of the Accounts.

TRC and its Subsidiaries are obligated to Bank in respect of loans in the aggregate amount of approximately $33,000,000 ("Loans") described in a Loan Agreement dated May 2, 1982, as amended and restated in a Fourth Amendment to Loan Agreement dated February 21, 1986 ("Loan Agreement"). All amounts owed to Bank under the Loan Agreement are secured by substantially all of the assets of TRC and its Subsidiaries including, without limitation, a security interest in all accounts receivable, contract rights and rights to payment owned by or due to TRC and or its Subsidiaries.

Wedge has been advised by Bank that Bank claims a security interest in the Accounts and that Bank intends to enforce its right to collect the Accounts.

Wedge has requested, and Bank has agreed, that Bank will agree to pursue the collection of the Accounts on the terms and conditions hereinafter set forth, without prejudice to the rights of Wedge or Bank.

NOW THEREFORE, in consideration of the premises, and for other good and valuable consideration the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

1. On May 1, 1986 TRC made written demand on Wedge for the sum of $2,336,923 in respect of the Tax Agreement.

2. Wedge denies liability on the Accounts and has refused to pay same.

3. As a result of Wedge's denial of liability as to the Accounts, TRC's accountants have required TRC to write off the Accounts as an asset for financial reporting purposes.

4. The Bank will not treat the reduction in TRC's net worth caused by writing off the Accounts as an Event of Default under the Loan Agreement.

5. The Bank will forbear from seeking to collect the Accounts from Wedge unless and until one or more of the following events or conditions occurs:

(a) Bank accelerates either or both of the loans by reason of an Event of Default as defined in the Loan Agreement.

(b) TRC or any of its Subsidiaries is involved as a debtor in a bankruptcy or comparable proceeding.

(c) The Existing Loans and the Guaranteed Loan, as defined in the Loan Agreement, and any extensions, modifications or renewals thereof, are not paid in full or refinanced to Bank's satisfaction by February 28, 1988 (or any extended maturity date). Bank makes no commitment to Wedge or TRC or any other person that Bank will extend the maturity date or otherwise amend the repayment terms of the Existing Loans or the Guaranteed Loan.

(d) Wedge's conduct toward TRC or its Subsidiaries or their employees ceases to be that strictly of a minority shareholder of TRC.

(e) Wedge takes any overt action toward TRC and/or its Subsidiaries which impairs their ability to repay the Loans.

6. Since the purpose of this Agreement was to suspend and preserve without prejudice to Wedge or the Bank their respective rights or position relative to the Accounts, Wedge represents and agrees:

(a) that it will not seek to modify the Accounts, the Tax Agreement or the Letter Agreement without Bank's prior consent, which consent may be arbitrarily withheld.

(b) that, until the Loans shall have been paid in full, it will not pay to any person other than Bank any sums in respect of the Accounts.

(c) that it will not assert against Bank any set off or other defense to payment of the Accounts which arose on or after January 1, 1986.

(d) that it will not assert against Bank or TRC any statute of limitations, laches, prejudice by reason of delay in enforcing the Accounts or any similar defense to the extent such defense arised out of action or inaction occurring on or after January 1, 1986.

7. Nothing in this Agreement or in that certain Stock Purchase and Sale Agreement and Plan of Recapitalization of even date herewith executed by and among TRC, Wedge, Rodgers International B.V., and Cumberland Valley Acquisition Corp., (the "Stock Agreement") or in that certain "Put Agreement" executed in connection with the Stock Agreement, is intended to, nor shall it, diminish or impair any rights of the Bank to collect the Accounts. Any agreement by TRC to forego rights in Accounts shall not be binding on the Bank but shall run exclusively between TRC and Wedge.

Executed at Nashville, Tennessee this 4th day of June, 1986.

THIRD NATIONAL BANK IN NASHVILLE

By: /s/ MICHAEL J. KANE
Title: Vice President

WEDGE GROUP INCORPORATED

By: /s/ WILLIAM HEILIGBRODT
Title: Vice Chairman & CEO

THE RODGERS COMPANIES, INC.

By: /s/ JAMES P. BENNETT
Title: President

89-945

(3)

No.

IN THE

Supreme Court of the United States

October Term 1989

WEDGE GROUP INCORPORATED,

Petitioner,

v.

THIRD NATIONAL BANK IN NASHVILLE,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS P. KANADAY, JR.
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21pp

QUESTIONS PRESENTED

I. To establish personal jurisdiction over a nonresident defendant, is it sufficient that the defendant has purposefully established minimum contacts with the forum and that the cause of action substantially relates to those contacts?

II. Do a nonresident corporation's own actions directed toward a resident subsidiary and the subsidiary's local bank constitute jurisdictionally significant "contacts" in a cause of action related to those actions?

PARTIES

The caption contains the names of the parties. Third National Bank in Nashville is a wholly owned subsidiary of Third National Corporation, which is a wholly owned subsidiary of Sun Trust Banks, Inc.

All subsidiaries of Third National Bank in Nashville are wholly owned subsidiaries, with the exception of Sun Trust Service Corporation. Sun Trust Service Corporation is wholly owned by banks owned by Third National Corporation, Sun Banks, Inc. and Trust Company of Georgia.

In addition to its ownership of Third National Bank in Nashville, Third National Corporation owns a 100% interest in Third Financial Services, Inc., and Trust Company of Tennessee, and in thirteen banks located within the State of Tennessee. Third National Corporation also owns a 99.9% interest in Peoples Bank in Lebanon, Tennessee.

In addition to its ownership of Third National Corporation, Sun Trust Banks, Inc. owns a 100% interest in Sun Banks, Inc., Trust Company of Georgia, SBF Agency, Inc., Sun Trust Data Systems, Inc., Sun Trust Insurance Company, Sun Trust Mortgage, Inc., Sun Trust Properties, Inc., and Sun Trust Securities, Inc.

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TABLE OF AUTHORITIES

No.

IN THE

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October Term 1989

WEDGE GROUP INCORPORATED,

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THIRD NATIONAL BANK IN NASHVILLE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THIRD NATIONAL BANK IN NASHVILLE ("Third National"), respondent, responds as follows to the Petition for Writ of Certiorari:

STATEMENT OF THE CASE

A. Facts

From 1982 to 1986, respondent Third National made loans to The Rodgers Companies, Inc. ("TRC"), a Delaware corporation with its principal place of business in Nashville, Tennessee. App. L. ¶ 2. TRC was a wholly owned subsidiary of petitioner WEDGE Group Incorporated ("WEDGE"), a Delaware corporation with its prin-

cipal place of business in Texas. App. J. ¶ 2; App. K. ¶ 2. As partial security for the loans, TRC granted to Third National security interests in all its accounts receivable and other rights to payment. App. J. ¶ 5; App. L. ¶ 3.

One of those accounts receivable or rights to payment is evidenced by a tax sharing agreement dated October 1, 1980, executed by WEDGE and by TRC and its subsidiaries (the "Tax Sharing Agreement"). *Id.* The Tax Sharing Agreement created certain obligations for WEDGE and TRC in connection with WEDGE's filing of consolidated federal income tax returns for a consolidated group consisting of WEDGE, TRC and their respective subsidiaries. App. H., Exhibit D.

TRC's obligations under the Tax Sharing Agreement included the submission to WEDGE of hypothetical tax returns based on a non-consolidated filing, and certain periodic tax payments to be made to WEDGE. *Id.* WEDGE's obligations under the Tax Sharing Agreement included (1) annual payments to TRC of amounts by which TRC's tax payments to WEDGE exceeded its hypothetical tax liability, (2) payment to TRC for TRC operating losses used by WEDGE to offset income of others in the consolidated group, and (3) payments to be made to TRC upon its withdrawal from the consolidated group. *Id.*

Throughout the term of the Tax Sharing Agreement, WEDGE actively participated in the affairs of TRC. From 1980 through 1986, WEDGE officers met regularly with management personnel of TRC in Nashville, Tennessee, to review, discuss, and direct the operations and financial activities of TRC and its subsidiaries. App. J. ¶¶ 8-9. From 1980 to early 1984, these meetings were held monthly. From 1985 to 1986 the frequency of these meet-

ings was reduced to approximately three to four times per year. *Id.*

In April and May of 1985, the financial condition of TRC worsened. App. L. ¶ 5. In the midst of TRC's financial crisis, WEDGE initiated negotiations with Third National to induce Third National to continue to extend credit to TRC. *Id.* These negotiations resulted in the execution of an amendment dated as of June 5, 1985 to the loan agreement between TRC and Third National (the "Third Amendment"). *Id.* WEDGE's role in the management of TRC was so important to Third National that the Third Amendment specifically provided that any material change in WEDGE's direct or indirect control of TRC would constitute an event of default under the loan agreement. App. L. ¶ 8.

To induce Third National to enter into the Third Amendment, WEDGE agreed to contribute and did contribute $7,500,000 in cash to TRC, to be treated as capital on TRC's books. App. L. ¶ 6. These funds were deposited into a new checking account at Third National, in Nashville, to be used in the ordinary course of business of TRC and its subsidiaries, and to act as additional collateral for Third National's loans to TRC. *Id.* Only certain officers of WEDGE, and no officers of TRC, were authorized to direct disbursements from the account. *Id.* Following the execution of the Third Amendment, WEDGE representatives spent extended periods of time in Nashville, Tennessee, reviewing the receivables and payables held by TRC and its subsidiaries and setting up a cash reporting system. App. J. ¶ 13; App. K. ¶ 6.

In early 1986, the financial condition of TRC and its subsidiaries worsened again. App. J. ¶ 14; App. K. ¶ 7; App. L. ¶ 9. In the course of working out some serious

financial problems with Third National, WEDGE and TRC management began negotiations for the sale of WEDGE's TRC stock to TRC management. *Id.* In conjunction with those plans, WEDGE representatives visited Nashville, Tennessee to review TRC's financial position, for the purposes of determining whether the stock should be sold and setting a purchase price. App. J. ¶ 14; App. K. ¶ 8.

These negotiations culminated in the execution in February, 1986 of a letter agreement regarding the sale of the stock (the "Letter Agreement"). App. J. ¶ 15; App. K. ¶ 9. The Letter Agreement essentially provided for the transfer of control of TRC from WEDGE to TRC management. *Id.* In reliance on the Letter Agreement, which WEDGE delivered to TRC management in Nashville, Third National again agreed to restructure its credit arrangements with TRC and its subsidiaries. App. J. ¶ 16; App. L. ¶ 10.

After the signing of the letter agreement, negotiations continued regarding the final form of the stock purchase agreement. App. J. ¶ 17; App. K. ¶ 10. During these negotiations, WEDGE raised issues regarding the treatment of the amounts it owed under the Tax Sharing Agreement. App. J. ¶ 18; App. K. ¶ 11. In fact, the status of the Tax Receivable became a pivotal point in negotiations surrounding the sale of the TRC stock. App. J. ¶ 19.

In order to allow the stock purchase to proceed, Third National agreed to WEDGE's request to forbear temporarily from attempting to collect the Tax Receivable from WEDGE. App. L. ¶ 12. WEDGE, Third National, and TRC then entered into an agreement (the "Tax Receivable Agreement") regarding the parties' respective rights in connection with the Tax Sharing Agreement.

App. J. ¶ 19; App. L. ¶ 12 and Exhibit A). The Tax Receivable Agreement provided that Third National and TRC would forbear from attempting to collect the Tax Receivable until certain conditions were met, but acknowledged that Third National could, under certain other conditions including TRC's default in the payment of its indebtedness to Third National, bring suit against WEDGE to recover the Tax Receivable. *Id.* The Tax Receivable Agreement recites that it was executed in Nashville, Tennessee. *Id.*

In late May or early June of 1986, WEDGE representatives again traveled to Nashville to finalize the details of the Tax Receivable Agreement and the stock purchase agreement. App. K. ¶ 10. WEDGE later completed its sale of its ownership interest in TRC to TRC management. App. J. ¶ 20; App. K. ¶ 12.

Subsequently, TRC defaulted on its loans from Third National. App. L. ¶ 4. In November of 1987 Third National brought suit against WEDGE in the United States District Court for the Middle District of Tennessee to recover the approximate sum of $2.6 million under the Tax Sharing Agreement. App. H. WEDGE then filed a motion to dismiss under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. Although the magistrate recommended denial of the motion, the district court, without rendering findings of fact or conclusions of law, rejected the magistrate's report and recommendation and granted WEDGE's motion to dismiss. App. D. The district court denied Third National's motion to reconsider. App. E. Third National appealed to the United States Court of Appeals for the Sixth Circuit.

B. The Opinion Below

The issue before the Sixth Circuit was whether a nonresident corporation could be subjected to the personal jurisdiction of a state in which it had established a long and continuous relationship with a wholly owned subsidiary, in an action brought by a secured party asserting the subsidiary's rights to recover amounts due under a contract between the parent and the subsidiary. Applying the three part test that it had earlier established in *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968), the Sixth Circuit held that due process requirements were satisfied and that the Tennessee court could exercise personal jurisdiction over the defendant.

The legal test applied by the court below derived from the three part test established in *Southern Machine*, as interpreted and expanded by subsequent decisions from this Court. That test is as follows:

> First, the defendant must purposefully avail itself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

401F.2d at 381.

The court below pointed to numerous acts of WEDGE that demonstrated to the court's satisfaction that WEDGE had "purposefully availed" itself of the privilege of acting in Tennessee or causing a consequence

there: WEDGE's 100% ownership of TRC, a corporation principally located in Tennessee; WEDGE's regular attendance at and participation in meetings held in Tennessee to review and direct TRC's operations; WEDGE's execution of and performance under the Tax Sharing Agreement, under which WEDGE shared income tax liability with Tennessee companies; WEDGE's active participation in negotiations with Third National regarding Third National's loans to TRC; and finally, WEDGE's execution, in Tennessee, of an agreement that directly addressed its potential liability under the Tax Sharing Agreement, the subject of the instant action. App. A. at 8. From these acts, the Court "ha[d] no hesitancy" in concluding that WEDGE had "purposefully availed" itself of acting and causing consequences in Tennessee. *Id.*

The court also had little difficulty in concluding that the second requirement of the *Southern Machine* test was met because Third National's cause of action to recover amounts due under the Tax Sharing Agreement had "a substantial connection" with and was "related to" WEDGE's forum related activities. App. A at 9-10. As the court noted, WEDGE entered into the Tax Sharing Agreement that is the subject of this action. App. A. at 10. WEDGE interjected itself in negotiations between Third National and TRC and made a $7.5 million capital infusion to induce Third National to continue to extend credit to TRC. *Id.* Finally, WEDGE executed, in Tennessee, a document stating the purported rights and obligations regarding the indebtedness and the Tax Sharing Agreement. App. A. at 10-11.

The court refused to accept WEDGE's argument that the second requirement in the *Southern Machine* test was not met because Third National's cause of action arose either from the Tax Sharing Agreement or from the

loan agreement between Third National and TRC, and not from WEDGE's contacts with Tennessee. Rather, the court held that the second requirement only meant that the cause of action have a "substantial connection with" the defendant's forum related activity. App. A. at 9. The facts recited above supplied that connection.

Finally, the court held that WEDGE had failed to present any considerations that would render the exercise of jurisdiction unreasonable. App. A. at 11-12. Noting Tennessee's interest in providing an effective avenue of redress for its residents, the court held that the *Southern Machine* test was satisfied and that WEDGE was subject to personal jurisdiction in Tennessee. *Id.* The Sixth Circuit denied WEDGE's motion for rehearing. App. F. WEDGE now seeks discretionary review by this Court.

SUMMARY OF ARGUMENT

The decision below was in accordance with the well-established body of law concerning due process limitations on personal jurisdiction over nonresident defendants. The decision below does not conflict with prior decisions from this Court or with decisions from other courts of appeals. Therefore, none of the considerations set forth in Supreme Court Rule 17 support the grant of a writ of certiorari.

REASONS FOR NOT ALLOWING THE WRIT

I. *The Opinion Below Is In Accord With This Court's Prior Decisions In International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945) And Its Progeny.*

WEDGE apparently does not dispute the finding below that it purposefully directed its activities toward Tennessee. Nor does it assert that Tennessee's interest in this action, brought by a Tennessee bank, is insufficient to render jurisdiction reasonable. Rather, WEDGE invites this Court's review due to the supposed necessity to define further and to revise the parameters of the requirement that a cause of action "arise from" or be "related to" a nonresident defendant's contacts with a forum to support specific jurisdiction. The Court should decline this invitation because the question of the sufficiency of the connection between a plaintiff's cause of action and a defendant's contacts with the forum is a highly factual one. Not only is WEDGE's proposed alteration to the existing legal standard of questionable future utility, but the alteration is wholly unnecessary to resolve the instant dispute.

The test applied below is entirely consistent with this court's opinion in *Burger King Corp. v Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), this court's most recent pronouncement concerning due process limitations on personal jurisdiction in a contract case. There, this Court established a two part test for determining whether an exercise of personal jurisdiction comports with due process requirements. First, the court must find that the defendant has purposefully established minimum contacts with the forum and that the litigation results from alleged injuries that "arise out of or relate

to" those contacts. 471 U.S. at 472, 105 S.Ct. at 2182, 85 L.Ed.2d at 540-41. Second, the court must find that the exercise of personal jurisdiction would be reasonable. 471 U.S. at 476, 105 S.Ct. at 2184, 85 L.Ed.2d at 543. Writing for the majority, Justice Brennan stated that the first prong of the *Burger King* test is satisfied "if the defendant purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." 471 U.S. at 472, 105 S. Ct. at 2182, 85 L.Ed 2d at 540-41 (citations omitted). The test enunciated by Justice Brennan is precisely the same as that applied by the Sixth Circuit below. The Sixth Circuit applied the correct test.

WEDGE's contention that the legal test applied below "conflicts" with this Court's prior opinions in *Kulko v. California Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978) and *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) is meritless because the factual situations are readily distinguishable. The issue in *Hanson* was whether a Florida court could exercise personal jurisdiction over a Delaware trust company in a dispute concerning the validity of a trust agreement executed by and between a Pennsylvania domiciliary and a Delaware trust company. Florida's only relationship to the dispute arose years later when the trust settlor moved there. Unlike the instant action, no relationship existed between the cause of action and the defendant's contacts with the forum. Accordingly, this Court held that the Florida court could not exercise personal jurisdiction over the Delaware trustee.

Similarly, in *Kulko*, this Court held that a California court could not exercise personal jurisdiction over a New York resident in a domestic dispute with his former wife, who had moved to California. The lower court had rested

its finding of personal jurisdiction on the father's acquiescence in his daughter's desire to live with her mother in California. This Court held that a father who had done nothing more than consent to allowing his daughter to spend some time in California had not "purposefully availed himself" of the benefits and protections of California's laws." 436 U.S. at 94, 98 S. Ct. at 1698, 56 L.Ed.2d at 142-43 (citations omitted.)

This Court in *Kulko* specifically distinguished the domestic situation presented there from the situation presented when a defendant seeks a commercial benefit from foreign activity. The Court noted:

> The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations. It thus cannot be said that appellant has sought a commercial benefit from solicitation of business from a resident of California that could reasonably render him liable to suit in state court.

436 U.S. at 97, 98 S. Ct. at 1690, 56 L.Ed.2d at 144. This Court further noted that there, as in *Hanson*, the separation agreement at issue "was entered into with virtually no connection with the forum state." *Id.*

The differences with the results reached below from the results reached in *Hanson* and *Kulko* derive not from the application of a different legal standard, but from factual scenarios at opposite ends of the spectrum. In *Hanson*, this Court found that no substantial relationship existed between the forum and the plaintiff's cause of action to determine the validity of the trust agreement. In *Kulko*, this Court found both that the defendant had not purposefully directed his activities toward California, and

that the cause of action — to modify a New York separation agreement — did not have a significant relation to the forum.

By contrast, the Sixth Circuit found that such significant relations did exist on the facts of the instant case. As the lower court noted, the very contract upon which Third National's claim is based is one executed by and between WEDGE and its Tennessee subsidiary. Moreover, WEDGE directly interjected itself in negotiations between its Tennessee subsidiary and its subsidiary's bank to induce Third National to extend additional credit to its subsidiary, and made a substantial capital infusion into its subsidiary to provide additional security for its subsidiary's debt to Third National. Finally, WEDGE entered into the Tax Receivable Agreement, an agreement it executed in Tennessee with a Tennessee company and a Tennessee bank, in which the parties stated their purported rights regarding the subsidiary's debt in general, and WEDGE's liability to the subsidiary was to Third National in particular. Under the facts, it can hardly be denied that a substantial relationship exists among the forum, the defendant and the cause of action. These facts distinguish the present action from *Hanson* and *Kulko*, and compel the result reached below.

Accordingly, it is clear that WEDGE's request to this Court is not that this Court review the Sixth Circuit's standard or the application of the standard to the undisputed facts, but rather to change the standard. Specifically, WEDGE asks this Court to hold that a forum cannot properly exercise personal jurisdiction over a nonresident defendant even if (a) the nonresident has purposefully directed his activities at forum residents, (b) the cause of action has a substantial connection with the defendant's forum related contacts, and (c) jurisdic-

tion would otherwise be reasonable, *unless* the cause of action technically "arises out of" the defendant's forum contacts. Such a requirement has never been, and should not now be, imposed by this Court. Moreover, its application to the facts of the instant case would not affect the result reached below.

WEDGE's insistence that a cause of action sued upon must formally "arise out of" a defendant's forum related activity finds no basis in prior decisions of this Court, and would represent a departure from controlling precedent. This Court has repeatedly and consistently held that a court may properly exercise specific jurisdiction over a nonresident defendant when a cause of action arises out of *or* relates to the defendant's forum related activity.

As the Sixth Circuit noted, the rule of law that the "arising from" requirement is satisfied if the cause of action is either 'related to' or 'connected with' the defendant's forum contacts in fact derives from the opinion of this Court in *International Shoe*. There, this Court stated:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations *arise out of or are in connection with* the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can in most instances, hardly be said to be undue.

International Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S. Ct. 154, 160, 90 L. Ed. 95, 104 (1945). Later opinions from this Court are in accordance with this rule. *See*

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872, 80 L. Ed.2d 404, 410-11 (1984); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 2182, 85 L. Ed.2d 528, 540-41 (1985).

The only consideration advanced in support of WEDGE's view that a cause of action should formally "arise from" a defendant's in-state activities is that not imposing such a requirement would have a detrimental impact on interstate and international trade. According to WEDGE, the Sixth Circuit opinion would "subject local companies to the jurisdiction of states a continent away simply because they chose to deal with a national seller." This argument might have merit if the decision below had allowed for an account creditor to *create* jurisdiction over an account debtor in a distant forum by assigning a claim to a creditor located there. The requirement that the nonresident purposefully direct its activities toward the forum and create a "substantial connection" with the forum — a requirement expressly recognized by the Court below — precludes such a result.

Cogent arguments counsel against the imposition of such a new requirement. Limiting specific jurisdiction in the manner proposed by WEDGE would "subject constitutional standards under the Due Process Clause to the vagaries of the substantive law or pleading requirements of each state." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. at 427; 104 S. Ct. at 1879; 80 L.Ed.2d at 419 (J. Brennan, dissenting). As Justice Brennan noted, because constitutional restrictions are founded upon concepts of reasonableness and fairness to the defendant, the fact that a particular cause of action may not directly "arise out of" a particular contact to the forum should not be of controlling significance, so long as the defendant

has established contacts with the forum substantially related to the underlying cause of action. *Id.*

Moreover, the application of WEDGE's proposed rule to factual situations such as the one presented in the instant case would have a chilling effect on interstate commerce and trade. WEDGE's proposed rule of law would operate to deprive a forum of its jurisdiction over a nonresident in a cause of action based upon a substantial business contract with a resident based solely upon the resident's assignment of its contract rights to its local lender. Such a rule would hinder substantially the free assignability of such contractual rights. WEDGE's invitation to alter the present state of the law must therefore be rejected.

Moreover, even if this court were to alter the standard as suggested by WEDGE and hold that a cause of action must technically "arise out of" a nonresident's forum contacts, the change would not affect the result in the case at bar. Third National's cause of action against WEDGE is based upon and "arises out of" the Tax Sharing Agreement — a substantial business contract with a Tennessee subsidiary — and one of the primary contacts upon which the court below rested its finding. The fact that Third National's right to enforce the contract derives from a separate document — the loan agreement between Third National and TRC — does not alter or affect the analysis or the outcome.

II. The Decision Below Does Not Conflict With The Decisions of Other Federal Courts of Appeals by Treating Parent-Subsidiary Contracts as Jurisdictionally Significant.

WEDGE next asserts that a conflict exists among the circuits concerning the extent to which contacts between a corporate parent and its subsidiary are jurisdictionally significant. According to WEDGE, one line of authority, represented by the opinion below, holds that such contacts qualify as purposeful contacts with the forum for jurisdictional purposes. WEDGE suggests that this line of authority is inconsistent with the decision by this court in *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333, 45 S.Ct. 295, 69 L.Ed. 589 (1925). The other line of cases, WEDGE insists, holds that dealings between a parent and a subsidiary must be ignored altogether in determining whether the parent is subject to personal jurisdiction within the forum.

However, a review of *Cannon* and the other authorities cited by WEDGE reveals (a) that the decision of the court below is consistent with *Cannon*; and (b) that no "split of authority" exists among the circuits concerning the jurisdictional significance of parent-subsidiary contacts.

In *Cannon*, this Court merely held that the activities of a subsidiary within a forum cannot be attributed to the subsidiary's nonresident parent for the purpose of establishing general jurisdiction over the parent. That proposition has never been disputed or questioned by Third National. More importantly, its validity is not questioned nor its integrity compromised by the decision below. The court below simply held, correctly, that WEDGE's own actions directed toward its Tennessee subsidiary and the

subsidiary's Tennessee bank should be considered in determining whether and to what extent it "purposefully availed itself of the privilege of acting in the forum state or causing a consequence in the forum state." App. A. at 7, *quoting Southern Machine v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968). The decision below is plainly not inconsistent with *Cannon*.

The decision below is in accord with decisions from other circuits that address the relevancy of parent-subsidiary contacts. As WEDGE correctly notes, other circuits have plainly held that contacts between a parent and its subsidiary "count" for jurisdictional purposes. Such contacts are especially significant when the cause of action arises from or is related to those contacts. For example, in *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977), the court held that a corporate parent was subject to personal jurisdiction in the subsidiary's forum for causes of action arising out of the parent's loan to its subsidiary. Similarly, the First Circuit has repeatedly held that although ownership of a forum subsidiary, along with contacts stemming from that ownership, may not *alone* be sufficient to subject the foreign corporation to suit within the forum, they are "relevant" factors to be considered in the jurisdictional calculus. *See, e.g., Volkswagen InterAmericanna, S.A. v. Rohlsen*, 360 F.2d 437, 440 (1st Cir.), *cert. denied*, 385 U.S. 919 (1966); *Engine Specialties, Inc. v. Bombardier Ltd.*, 454 F.2d 527, 529-30 (1st Cir. 1972); *Mangual v. General Battery Corp.*, 710 F.2d 15, 21 (1st Cir. 1983).

WEDGE has failed to cite to this Court any authorities that either dispute the holding in the above cases, or that suggest that any real split of authority exists among the circuits regarding the relevance of parent-subsidiary contacts. Rather, the cases cited by WEDGE correctly

hold that although ownership of a subsidiary within the forum does not automatically render a nonresident corporation amenable to suit there, the parent's own actions directed toward the forum might.

In *Southmark Corp. v. Life Investors, Inc.*, 851 F. 2d 763 (5th Cir. 1988) a case extensively relied upon by WEDGE, the court held that the actions of a subsidiary could not be imputed to the parent for the purpose of establishing general jurisdiction over the parent. Finding that the parent had itself directed no actions toward the forum, the court held that the forum could not exercise "specific jurisdiction" over the parent.

Similarly, in *Blount v. Peerless Chemicals, Inc.*, 316 F. 2d 695 (1963), the court was presented with the converse of that presented in *Southmark*, i.e. whether a *parent's* contacts with the forum could be imputed to the nonresident *subsidiary* to establish general jurisdiction over the subsidiary. The court held, correctly, that the contacts could not be imputed. However, the court noted that specific jurisdiction might be established if sufficient contacts existed among the nonresident, the cause of action, and the forum. The court expressly noted that specific jurisdiction is properly exercised if the cause of action sued upon "relates in some significant manner to the forum state . . ." 316 F. 2d at 700. The Court noted that this is especially true if the injured party is a resident of the forum. *Id.* Only after examining the contacts between the forum and the cause of action and finding them "far too tenous" to support jurisdiction, did the court affirm the lower court's order dismissing the action against the subsidiary. *Id.*

Finally, in *Harris v. Deere & Co.*, 223 F. 2d 161 (4th Cir. 1955) (*per curiam*), the court affirmed the dismissal

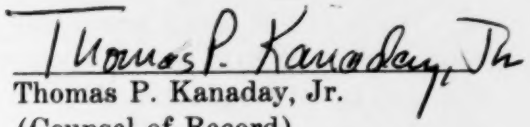
of an action against a parent corporation where process had been served on the defendant's wholly-owned subsidiary. The dismissal was affirmed only after the court specifically found that the parent had "no contacts whatever within the state upon which jurisdiction can be based" "unless the activities of [the subsidiary] are considered." 223 F. 2d at 162.

None of the cited cases supports the proposition advanced by WEDGE that a nonresident's own actions directed toward its forum subsidiary must be ignored for jurisdictional purposes. The argument against such an absolute rule is readily apparent when viewed in the context of the instant case. In short, WEDGE's position is that contracts between two strangers can be, but the same contracts between a corporate parent and its subsidiary cannot be, "contacts" for jurisdictional purposes. Applied to the instant case, that rule of law would lead to the result that the Tax Sharing Agreement that is the subject of this lawsuit, because it derives from the existence of the parent-subsidiary relationship, must be ignored altogether in determining whether a Tennessee court can exercise personal jurisdiction in a lawsuit arising out of that very agreement. The argument is untenable on its face, and finds no support in decisions from this Court or any other.

CONCLUSION

Third National respectfully submits that none of the factors enumerated in Supreme Court Rule 17 are applicable to the decision below, and that the petition for writ of certiorari should accordingly be denied.

Respectfully submitted,



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CERTIFICATE OF MAILING AND SERVICE

As a member of the bar of this Court, I certify that the appropriate number of copies of this Brief in Opposition To Petition To Writ of Certiorari were served upon the Clerk of this Court via overnight courier, and upon Mr. William H. White, 5100 First Interstate Bank Plaza, 1000 Louisiana, Houston, Texas 77002-5096, counsel of record for Petitioner WEDGE Group Incorporated, via United States mail, with first class postage prepaid, on this 28th day of December, 1989 and within the time permitted by the rules of this Court.

Thomas P. Kanaday Jr.
Thomas P. Kanaday, Jr.

Sworn to and subscribed before me, this the day of December, 1989.

Annette Roberts
Notary Public

ANNETTE ROBERTS
(Print name of notary here)

My Commission Expires: 1-23-93